DOCKET

EDITOR'S NOTE

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No. 85-673-AFX
Status: GRANTED

Title: Neil F. Hartigan, Attorney General of the State of Illinois, etc., et al., Appellants
v.
David Zbaraz and Allan G. Charles, etc.

Docketed:
October 16, 1985

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for appellant: Stewart,Roma, Hayes,Michael J.

Counsel for appellee: Connell,Colleen K.

Entry	Date	Note	Proceedings and Orders
1	Aug 12 1985		Application for extension of time to docket appeal and order granting same until October 17, 1985 (Stevens, August 13, 1985).
2	Oct 16 1985	G	Statement as to jurisdiction filed.
3	Oct 16 1985		Appendix of appellant Atty. Gen of IL, Hartigan filed.
5	Nov 12 1985		Order extending time to file response to jurisdictional statement until December 18, 1985.
6	Dec 21 1985		Motion of appellees David Zbaraz, et al. to dismiss or affirm filed.
7	Jan 8 1986		DISTRIBUTED. January 24, 1986
8	Jun 23 1986		REDISTRIBUTED. June 26, 1986
10	Oct 3 1986		REDISTRIBUTED. October 10, 1986
11	Oct 14 1986		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
13	Nov 17 1986		Order extending time to file brief of appellant on the merits until December 19, 1986.
14	Nov 20 1986		Record filed.
15	Nov 20 1986		Certified copy of C. A. proceedings received.
16	Nov 26 1986		Joint appendix filed.
17	Nov 22 1986	D	Motion of Legal Defense Fund for Unborn Children for leave to participate in oral argument as amicus curiae filed.
18	Nov 22 1986	D	Motion of Legal Defense Fund for Unborn Children for leave to file a brief as amicus curiae filed.
19	Dec 8 1986		Motion of Legal Defense Fund for Unborn Children for leave to DENIED.
20	Dec 8 1986		Motion of Legal Defense Fund for Unborn Children for leave to file a brief as amicus curiae DENIED.
21	Dec 16 1986		Brief amicus curiae of Ohio, et al. filed.
22	Dec 19 1986		Brief amicus curiae of U.S. Catholic Conference filed.
23	Dec 19 1986		Brief amicus curiae of American United for Life Legal Defense filed.
24	Dec 19 1986		Brief amicus curiae of American Life League, Inc. filed.
25	Dec 19 1986		Brief amicus curiae of Concerned Women for America filed.
26	Dec 19 1986		Brief amicus curiae of Catholic League for Religious and Civil Rights filed.
27	Dec 19 1986		Brief of appellant Atty. Gen of IL, Hartigan filed.
28	Dec 19 1986		Brief amicus curiae of Family Research Council, et al.

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No. 85-673-AFX

Entry	Date	Note	Proceedings and Orders
			filed.
29	Dec 19 1986		Application of appellants' for leave to file their brief on the merits in excess of the page limitation (A-472)
30	Dec 19 1986		and order granting same by O'Connor, J., on Dec. 19, 1986. The brief may not exceed 59 pages.
31	Dec 19 1986		Brief amicus curiae of American Victims of Abortion, et al. filed.
33	Jan 5 1987		Order extending time to file brief of appellee on the merits until February 12, 1987.
34	Jan 15 1987		Record filed.
35	Feb 6 1987		SET FOR ARGUMENT. Wednesday, April 1, 1987. (3rd case)
36	Feb 12 1987		Brief amicus curiae of American Psychological Assn. filed.
37	Feb 12 1987		Nine lodgings received.
38	Feb 12 1987		Brief amicus curiae of American Coll. of Obstetricians & Gynecologists, et al. filed.
39	Feb 12 1987		Brief of appellees David Zbaraz, et al. filed.
40	Feb 17 1987		CIRCULATED.
41	Feb 17 1987		Lodging received. (10 copies).
42	Feb 12 1987	X	Brief amicus curiae of American Public Health Assn., et al. filed.
43	Feb 12 1987	X	Brief amicus curiae of Certified Classes of Pregnant Minors, etc, et al. filed.
44	Feb 12 1987	X	Brief amicus curiae of Natl. Abortion Rights Action League, et al. filed.
45	Mar 25 1987	X	Reply brief of appellant Atty. Gen of IL, Hartigan filed.
46	Mar 30 1987		Oral argument in this case, set for Wednesday, April 1, 1987, is deferred to a later date. No. 85-6725,
47	Mar 30 1987		Bourjaily v. United States, will be argued in its stead.
48	Apr 7 1987		The parties are directed to file supplemental briefs addressing the merits of the second question
49	Apr 7 1987		presented in appellants' jurisdictional statement, as well as the question whether the Court of Appeals'
50	Apr 7 1987		decision is sufficiently final to permit this Court to take jurisdiction over the case under 28 U.S.C.
51	Apr 7 1987		Section 1254(2) to review both questions presented. Rule 35 of the rules of this Court prescribes the
52	Apr 7 1987		time for filing these supplemental briefs.
53	Apr 28 1987		Order extending time to file appellants' supplemental brief on the merits to and including June 22, 1987.
54	Jun 22 1987		Supplemental brief of amicus curiae American United for Life Legal filed.
55	Jun 22 1987		Brief amicus curiae of Nevada filed.
56	Jun 22 1987		Brief amicus curiae of Family Research Council, et al. filed.
57	Jun 22 1987		Supplemental brief of appellant Atty. Gen of IL, Hartigan filed.
59	Jul 14 1987		Order extending time to file brief of appellee on the merits until August 7, 1987.
60	Nov 22 1986	D	Motion of Alan Ernest to allow counsel to represent Children unborn and born alive filed.
61	Dec 8 1986		Motion of Alan Ernest to allow counsel to represent

No. 85-673-AFX

Entry	Date	Note	Proceedings and Orders
			Children unborn and born alive DENIED.
62	Jul 23 1987		THE ABOVE MOTION AND ORDER ON THE MOTION ARE CORRECTED.
63	Aug 3 1987		Supplemental brief of appellees David Zbaraz, et al. filed.
64	Aug 7 1987		Brief amicus curiae of Judicial Consent for Minors Panel and appendix filed.
65	Sep 2 1987		CIRCULATED.
66	Aug 31 1987		SET FOR ARGUMENT. Tuesday, November 3, 1987. (1st case).
67	Oct 27 1987	X	Reply brief of appellant filed.
68	Nov 3 1987		ARGUED.

JURISDICTIONAL

STATEMENT

No. 85-672

Supreme Court, U.S.
FILED
16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

JURISDICTIONAL STATEMENT

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Printed by Authority of the State of Illinois (P.O. 33006—55—10-16-85)

QUESTIONS PRESENTED

1. Whether Illinois may constitutionally impose a waiting period, applicable only to minors and incompetents, after parental notification but before an abortion is performed, where it also provides a judicial alternative to notification.

2. Whether the judicial alternative to parental notification of the Illinois Parental Notice of Abortion Act of 1983 provides a constitutionally sufficient framework for ensuring confidential and expedited appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

JURISDICTIONAL STATEMENT

Appellant NEIL F. HARTIGAN appeals from the final judgment of the United States Court of Appeals for the Seventh Circuit entered on May 20, 1985. The Court of Appeals enjoined the Illinois Parental Notice of Abortion Act of 1983, and affirmed in part and vacated in part an order of the United States District Court for the Northern District of Illinois entered on May 4, 1984. Appellant respectfully submits this Statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that the federal questions are substantial.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit entered May 20, 1985 is reported at 763 F.2d 1532 (7th Cir. 1985) (Appendix A). The memorandum opinion of the United States District Court for the Northern District of Illinois rendered May 4, 1984 is reported at 584 F.Supp. 1452 (N.D. Ill. 1984) (Appendix B). The judgment order of the Court of Appeals entered on May 20, 1985 is not reported, but is reprinted at Appendix C.

JURISDICTION

This action, brought under 42 U.S.C. § 1983, draws into question the constitutionality of the Illinois Parental Notice of Abortion Act of 1983. Invoking the jurisdiction of the District Court under 28 U.S.C. §§ 1331 and 1343, appellees filed a class action seeking declaratory and injunctive relief. On May 4, 1984, the District Court entered judgment in favor of appellees and enjoined enforcement of the Act.

On appeal, the United States Court of Appeals for the Seventh Circuit also enjoined enforcement of the Act. It affirmed one portion of the District Court's decision and vacated and remanded another. Its judgment was entered on May 20, 1985.

Appellant Hartigan filed his Notice of Appeal in the Court of Appeals on August 8, 1985, a copy of which is

attached as Appendix D. Jurisdiction of the Supreme Court of the United States to review this judgment by appeal is conferred by 28 U.S.C. § 1254(2). *See also Malone v. White Motor Corporation*, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I
U.S. CONST. amend. IV
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U.S. CONST. amend. XIV, § 1

(The text of these provisions is reprinted herein as Appendix E)

STATE LAWS

Illinois Parental Notice of Abortion Act of 1983, Ill. Rev. Stat. ch. 38, ¶ 81-61 *et seq.* (West Supp. 1984).

(The text of this statute is reprinted herein as Appendix F)

STATEMENT OF THE CASE

The State Statute

On November 2, 1983, the Illinois General Assembly enacted the Parental Notice of Abortion Act of 1983. Ill. Rev. Stat. ch. 38, ¶ 81-61 *et seq.* (West Supp. 1984). The Act is designed to protect minors against their own immaturity, to foster and preserve the family structure, and to protect the rights of parents to rear their children. Ill. Rev. Stat. ch. 38, ¶ 81-62 (West Supp. 1984). To achieve those objectives, Section 4(a) provides that actual notice must be given to both parents or, if applicable, to a legal guardian, twenty-four hours before an abortion is performed upon an unemancipated minor.[1] Ill. Rev. Stat. ch. 38, ¶ 81-64 (West Supp. 1984). Under Section 7(a), however, the waiting period need not be observed if both parents have been notified and they either accompany their child to the place where the abortion will be performed or submit signed, notarized statements that indicate that they have been notified. Ill. Rev. Stat. ch. 38, ¶ 81-67(a) (West Supp. 1984). The notice requirement may be waived altogether if the minor petitions the circuit court and demonstrates that 1) she is mature and sufficiently well-informed to make the abortion decision on her own, or 2) that notification would not be in her best interest. Ill. Rev. Stat. ch. 38, ¶¶ 81-64(c) and 81-65(d) (West Supp. 1984).

Section 5 of the Act establishes judicial procedures for obtaining waiver of notification. Ill. Rev. Stat. ch. 38,

[1] The Act also applies to incompetent persons. Ill. Rev. Stat. ch. 38, ¶ 81-64 (West Supp. 1984). This discussion will refer to minors only as they were the focus of the Court of Appeals' decision.

¶ 81-65 (West Supp. 1984). The minor seeking the waiver must file a petition in the circuit court, which is required to appoint a guardian ad litem and may appoint counsel if the applicant desires. Ill. Rev. Stat. ch. 38, ¶ 81-65(b). Section 5(c) provides that court proceedings "shall be confidential and shall ensure the anonymity" of the applicant. Ill. Rev. Stat. ch. 38, ¶ 81-65(c) (West Supp. 1984). Moreover, the circuit court must reach a decision within forty-eight hours of the filing of the petition, must make specific factual findings and legal conclusions, and must maintain a confidential record of the evidence. Ill. Rev. Stat. ch. 38, ¶ 81-65(c) and (e) (West Supp. 1984).

In the event that the circuit court denies the petition, "[a]n expedited confidential appeal shall be available, as the Supreme Court provides by rule". Ill. Rev. Stat. ch. 38, ¶ 81-65(f) (West Supp. 1984). Further, in Section 5(g), the Illinois Supreme Court "is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner." Ill. Rev. Stat. ch. 38, ¶ 81-65(g).

The Constitutional Challenge

On January 26, 1984, before the effective date of the Act, appellees filed a class action in the United States District Court for the Northern District of Illinois challenging its constitutionality. On the same day, the District Court entered a temporary restraining order prohibiting defendants from enforcing it.

Subsequently, the District Court certified plaintiff and defendant classes. The plaintiff class is composed of all licensed physicians presently performing or desiring to perform abortions for unemancipated minors and disabled

persons in Illinois and all unemancipated minors capable of giving informed consent to an abortion or whose best interest would not be served by notice to both parents. The defendant class consists of all state's attorneys of the various counties in Illinois.

On May 4, 1984, the District Court granted appellees' motion for summary judgment. It found that the twenty-four-hour waiting period imposed an unconstitutional burden on a minor's right to obtain an abortion. It further ruled that the judicial alternative to notification did not adequately guarantee anonymous and expeditious procedures for waiving notification. Although the District Court upheld other portions of the Act, it refused to sever them, finding that the statute would have little operative significance without the invalidated provisions. The District Court, therefore, declared the entire Act unconstitutional and permanently enjoined its enforcement.

Appellants Hartigan and Daley appealed to the United States Court of Appeals for the Seventh Circuit. While upholding the notification requirement, the Court of Appeals held the twenty-four-hour waiting period unconstitutional and affirmed that portion of the District Court's order. The Court of Appeals also ruled that the exception to the twenty-four-hour waiting period contained in Section 7(a) did not remove the constitutional infirmities of that requirement. It, therefore, declared those portions of the statute unconstitutional.

The Court of Appeals, however, found those provisions severable. Although it concluded that the Act alone failed to provide a constitutionally sufficient framework for expedited and confidential appeals from the denial of a waiver petition, it refused to declare the Act facially invalid. Instead, it found that the Illinois Supreme Court

should be provided with an opportunity to enact rules governing appeals for these proceedings. Consequently, the Court of Appeals vacated the portion of the District Court's order which invalidated the provisions governing judicial procedures and remanded pending further action by the Illinois Supreme Court. However, it enjoined enforcement of the Act until the Illinois Supreme Court promulgates constitutionally sufficient rules governing appeals.

On August 8, 1985, appellant Hartigan filed his Notice of Appeal to the United States Supreme Court from the decision of the Court of Appeals.

ARGUMENT

I.

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL BECAUSE STATES REQUIRE FURTHER GUIDANCE FROM THIS COURT IN SHAPING THEIR REGULATION OF PARENTAL INVOLVEMENT IN ABORTION DECISIONS OF MINOR CHILDREN.

States have responded in a variety of ways in devising constitutionally adequate regulations of minors' abortion decisions. Those responses reflect an attempt to accommodate the minor's privacy interests, the parents' right to direct the upbringing of their children, and the states' traditional role in protecting their young citizens from making serious and potentially harmful decisions without adequate adult guidance. In addition, the methods employed to achieve that accommodation are dictated by the unique qualities that each state possesses as a separate

political unit. In this respect, allowing states some flexibility contributes to an important attribute of our federal system: experimentation in the search of the best method to protect all of the constitutional interests at stake.

It is settled that a state may require parental notification of an immature, unemancipated minor's decision to obtain an abortion. *H.L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981). Similarly, this Court has upheld a consent requirement, a more restrictive type of parental participation, provided the state also establishes an alternative to parental involvement for mature minors or immature minors whose best interests preclude such involvement. *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983). This Court, however, has not ruled upon the constitutionality of requiring a short waiting period applicable only to minors, designed to provide an opportunity for meaningful consultation, and accompanied by a judicial alternative for waiving notification.

The Seventh Circuit has twice struck down such a requirement. *Zbaraz v. Hartigan*, 763 F.2d 1532 (1985); *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F.2d 1127 (1983). ACCORD: *Orr v. Knowles*, No. CV-81-0-301 (D. Neb. May 30, 1981). Other courts have upheld waiting periods applicable in these narrow circumstances. *See, e.g., Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1205-1206 (6th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983); *Hodgson v. Minnesota*, No. 3-81-Civ. 538 (D. Minn. March 22, 1982).

More than one-half of the states have enacted statutes requiring some type of parental involvement in a minor's

abortion decision.[2] Eight states require parental notification.[3] Many of those states, like Illinois, mandate a short waiting period between parental notification and the performance of the abortion.[4]

The Seventh Circuit's decision in this case conflicts with those decisions which have upheld waiting periods applicable in these circumstances. Moreover, its decision prohibits states from selecting a moderate course for involving parents in their daughter's abortion decision. The effect of its ruling is to require states merely to provide for notification without any assurance that consultation will occur or, alternatively, to require consent, the most restrictive means of parental involvement. This Court should grant plenary review in order to resolve this conflict and to provide an authoritative ruling which permits states to choose a method for parental involvement which adequately protects all of the private and governmental interests involved.

This Court's guidance is also necessary to enable states to select constitutionally adequate alternative procedures to parental involvement. As is true with regard to notice

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[2] Alaska, Arizona, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, West Virginia. Citations to the relevant statutes are set forth in Appendix G.

[3] Arizona, Idaho, Illinois, Maryland, Minnesota, Nevada, Utah, West Virginia.

This list does not include Maine, Nebraska, and Tennessee which required waiting periods prior to court rulings enjoining enforcement of their statutes. It does include those states whose statutes are the subject of current litigation. *See* Appendix G.

[4] Arizona, Idaho, Minnesota, West Virginia.

and consent, states have not been uniform in their approach to satisfying this requirement.

Many states, like Illinois, designate courts as the independent decision-maker to determine whether a minor child should be exempt from parental involvement.[5] Others provide non-judicial avenues for adult guidance. Maryland, for example, permits waiver if, in the physician's professional judgment, notice "may lead to physical or emotional abuse of the minor." Md. Health-Gen. Code Ann. § 20-103(c) (1982). Similarly, West Virginia allows waiver if a second physician finds that the minor is mature or that notification would not be in her best interests. W. Va. Code § 16-2F-3(c) (1985).

Even those states that place the waiver procedures exclusively with their courts have created diverse methods of complying with this Court's general directives requiring confidential and expeditious alternatives to parental involvement. Several states' judicial by-pass procedures are quite similar to Illinois' procedures. *See, e.g.*, Ky. Rev. Stat. § 311.732 (1983); Minn. Stat. Ann. § 144.343 (West Supp. 1985); 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983). Some are only slightly different. Indiana, for example, offers court proceedings much like Illinois, but also allows the physician, as well as the minor herself, to file the waiver petition in the juvenile court. Ind. Code Ann. § 35-1-58.5-2.5 (Burns Supp. 1985).

Others vary quite substantially. In Nevada, the district court judge conducts an informal interview with the minor seeking waiver of notification. Only if the petition is

[5] Arizona, Florida, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, North Dakota, Pennsylvania, Rhode Island.

denied are more formalized judicial procedures required to be followed. Nev. Rev. Stat. § 442.255, *amended by* Act of June 14, 1985, ch. 681, 1985 Nev. Adv. Sheets 2306. Louisiana also provides for an informal setting. Waiver applications are heard in chambers both in the trial court and the court of appeal, but the appeal involves a de novo hearing. La. Rev. Stat. Ann. § 40:1299.35.5(3), (6) and (8) (West Supp. 1985).

As these variations demonstrate, the methods chosen conform to the individual character of the states and reflect the unique needs and structures of their courts. In enjoining the operation of this Act's by-pass procedures, the Seventh Circuit found fault with the Illinois Act because, unlike the Missouri Act involved in *Ashcroft*, it did not impose a specified time requirement for perfecting appeals and did not detail the method by which the minor's anonymity is assured, such as specifically allowing the minor to use her initials.

That approach fails to take into account that Illinois is not constitutionally required to pattern its legislation after the statutes of other states. Each state must mold its statutory scheme in such a way as to comply with its local laws, customs, and practices. Indeed, as long as the state's choice does not encroach upon fundamental liberties, as is true in this case, allowing the state some latitude contributes to salutary experimentation in devising the most workable means of complying with constitutional requirements.

Further guidance is required from this Court in order to elucidate the contours that the alternative procedures must take in order to bring them within the general directives that they be confidential and expeditious. Until the Seventh Circuit's decision is reviewed, other states, like

Illinois, will be hampered in adopting methods which conform to this Court's mandates and their unique political structures.

II.

THE SEVENTH CIRCUIT'S DECISION, HOLDING INVALID A TWENTY-FOUR-HOUR WAITING PERIOD FOLLOWING PARENTAL NOTICE, WHICH IS DESIGNED TO FACILITATE MEANINGFUL CONSULTATION, IS INCONSISTENT WITH THIS COURT'S DECISIONS; IT ALSO FAILS TO ACCORD PROPER DEFERENCE TO ILLINOIS' INTEREST IN PROTECTING THE SAFETY AND WELFARE OF ITS YOUNG CITIZENS AND TO THE RIGHTS OF PARENTS TO DIRECT THE CARE AND UPBRINGING OF THEIR CHILDREN.

In *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983), this Court upheld a Missouri statute which required a minor child to delay her abortion until her parents consented to it, unless she obtained judicial waiver of that requirement. While such a requirement obviously imposed impediments to the minor's freedom to obtain an abortion, it was justified by the significant state interest in encouraging parents' involvement in their daughter's decision to terminate her pregnancy. Further, parental involvement was justified because parents have constitutionally recognized rights to guide, nuture, and control their minor children.

In spite of this Court's decision in *Ashcroft*, the Seventh Circuit found invalid a brief waiting period, following notification, which is designed to encourage meaningful dialogue between parents and their minor child before she makes the serious decision to terminate her pregnancy. While recognizing Illinois' legitimate interest in promoting parental consultation, the Court of Appeals nevertheless found that that interest did not provide a sufficient justification for delaying a minor's abortion for twenty-four hours. According to the Court, the waiting period "imposes a far greater burden on a minor's rights than a parental notification requirement which provides an exception to notification for mature minors and immature minors whose best interests require an abortion." Additionally, the Court observed, "it does not significantly further the state's interest in promoting parental consultation when combined with a notification requirement, which itself promotes that interest." *Zbaraz v. Hartigan*, 763 F.2d 1532, 1538 (7th Cir. 1985).

The Seventh Circuit's decision is erroneous for several reasons.

1. The Seventh Circuit's Decision Is Inconsistent With This Court's Decision In *Ashcroft*.

Restricting a minor's right to an abortion by requiring her to obtain her parents' consent before undergoing that procedure is far more restrictive than the short delay prescribed in the Illinois Act. Obtaining parental consent may result in substantial delays and even preclude the minor from having the abortion altogether. In contrast, the Illinois Act does not impose a parental veto. It merely allows a brief time to facilitate consultation between parents and their daughter. After notification occurs and the waiting period ends, the minor is free to proceed with the abortion whether or not her parents consent.

In *Ashcroft*, this Court weighed the burdensomeness of the more restrictive parental consent requirement and found that it was justified by the important, countervailing state and parental interests. If Missouri may constitutionally impose such a stringent impediment to a minor's abortion, Illinois is surely within constitutional bounds in requiring this brief delay.

2. The Seventh Circuit Incorrectly Evaluated The Interests Of Parents.

The effect of the Seventh Circuit's decision is to diminish the possibility that meaningful parental consultation will occur. By eliminating the waiting period from the Act, the child's parents could be notified five minutes before the abortion is performed. That result undermines the State's interest in assuring that the minor's abortion decision be fully informed and guided by mature judgment. It also disrupts the family integrity that the Act was designed to achieve. Surely, if parents' first awareness of their daughter's abortion decision is an eleventh-hour phone call, friction among the parents and their daughter is a likely prospect.

While this Court has struck down a waiting period applicable to adult women, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), it has not decided that a similar restriction upon a minor imposes an undue burden on her right to obtain an abortion when the state also provides a judicial alternative to parental involvement. The Seventh Circuit nevertheless applied *Akron*'s reasoning to this regulation affecting only minors. It also relied upon numerous lower court decisions, most of which had invalidated statutes because they imposed waiting periods that were also applicable to adult women or because they failed to provide adequate alternatives to parental notification. 763 F.2d at 1536-37. In so doing, the Court failed to comprehend fully the nature of the competing interests involved.

An adult woman is presumed capable of examining, by herself, the myriad factors that inform the abortion decision. An immature, unemancipated minor is not. It is precisely because of her vulnerability and inability to make

informed and mature decisions that adult guidance is needed. It is those factors that justify statutory requirements designed to afford such guidance.

Moreover, the parents of a minor child have constitutionally recognized interests in her care and upbringing. Their interest extends to providing guidance and support for her when she is confronted with stressful and difficult decisions. They may also provide information about her health and perspective about the psychological, emotional, and moral concerns pertinent to the abortion decision.

A waiting period applicable only to minors, who also have available to them avenues for by-passing notification, has significantly different constitutional implications than a waiting period imposed upon adult women. The nature of the state's objectives are qualitatively different. Further, the private interests, including the minor child's interest in physical and emotional health, as well as those of her parents in participating in and directing her upbringing, justify this type of regulation. The Seventh Circuit gave inadequate recognition to all of these factors and, thus, misapplied *Akron*.

In this context, a waiting period is necessary to protect all of the interests involved. Notice without some reasonable opportunity for consultation falls short of achieving the state's objectives and infringes upon the parents' role in directing and guiding their children's upbringing. Informing parents that their daughter is about to undergo an abortion is not the purpose of the notification requirement. The justification is, rather, to enable parents to provide their daughter with the advice and support that she is unable to obtain from other sources. In order to achieve that objective, the Act aims at meaningful notice. That is, notice reasonably calculated to apprise parents of the

pendency of their daughter's abortion in time to afford them an opportunity to consult with her. In light of the need to arrange time for discussion, the importance of the decision, and the myriad factors to be evaluated and considered, a twenty-four-hour waiting period is hardly an unreasonable restriction.

3. The Seventh Circuit Employed The Wrong Level Of Scrutiny In Evaluating State Regulation Of Minors' Abortion Decisions.

The Court of Appeals required the State to prove that the regulation was "narrowly drawn to further a compelling interest." *Zbaraz*, 763 F.2d at 1537 (quoting *Charles v. Carey*, 627 F.2d 772, 785 (7th Cir. 1980)). While that standard may be appropriate for regulations affecting "women who seek to obtain an abortion," 763 F.2d at 1537, this Court has not required such exacting scrutiny for regulations affecting minor children.

The standard applicable here requires the state to demonstrate only that it has a "significant . . . interest . . . that is not present in the case of an adult." *Carey v. Population Services International*, 431 U.S. 678, 693, 97 S.Ct. 2010, 2020, 52 L.Ed.2d 675, 690 (1977) (plurality) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75, 96 S.Ct. 2831, 2844, 49 L.Ed.2d 788, 808 (1976)). *See also Akron*, 462 U.S. at 427 n.10, 103 S.Ct. at 2491 n.10, 76 L.Ed.2d at 701 n.10. Further, this Court has allowed the state greater latitude in selecting regulatory methods pertaining to minors. The state is not required, as the Seventh Circuit's decision mandates, to select the least restrictive alternative in devising regulations affecting a minor's abortion decision.

Both parental consent and notification are designed to promote the legitimate interest in ensuring parental involvement in a minor child's abortion decision. Of the two, notification, which does not preclude an abortion even over parents' objections, is clearly less restrictive. Yet, this Court has permitted parental consent as a valid means of achieving parental involvement, provided an alternative procedure exists to exempt a minor from that requirement. *Ashcroft, supra.* If states were required to select the least restrictive alternative, notification alone would withstand such exacting scrutiny, because notification promotes the state's interest without additional impediments to the minor's obtaining an abortion.

Similarly, in *Bellotti v. Baird*, 433 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (*Bellotti II*), while observing that proceedings before a juvenile court or administrative agency would provide a less formal forum than judicial proceedings, this Court did not hold that these less burdensome alternatives were constitutionally required. *Id.* at 643 n.22, 99 S.Ct. at 3048 n.22, 61 L.Ed.2d at 813 n.22. Indeed, the alternative procedure chosen both by Massachusetts in *Bellotti II* and by Missouri in *Ashcroft* was the more onerous requirement of judicial proceedings. It is clear, then, that statutes encouraging parental involvement through notice or consent requirements need not be so narrowly drawn as to provide for the least restrictive method of achieving legitimate state interests.

State regulation must be reasonably related to important state interests. *See, e.g., Ashcroft*, 462 U.S. at 485-90, 103 S.Ct. at 2522-24, 76 L.Ed.2d at 741-44; *Akron*, 462 U.S. at 434, 103 S.Ct. at 2495, 76 L.Ed.2d at 705-706. When a state acts to further its significant interests, it "necessarily must have latitude in adopting regulations of general applicability in this sensitive area." *Akron*, 462 U.S. at 434, 103 S.Ct. at 2495, 76 L.Ed.2d at 705. These

principles have special significance when applied to state regulations affecting minors.

Traditionally, states have been accorded a broader spectrum of powers to control the activities of minors than they could assert over the activities of adults. *Compare Danforth*, 428 U.S. at 67-71, 96 S.Ct. at 2840-42, 49 L.Ed. 2d at 804-806 (striking down spousal consent requirement for adult women) *with Ashcroft*, 462 U.S. at 490-93, 103 S.Ct. at 2525-26, 76 L.Ed.2d at 744-46 (upholding parental consent requirement for minors when judicial alternatives provided). *See also Carey v. Population Services International, supra*; *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). This greater latitude is justified by the states' paramount interest in protecting minors and providing for their welfare. When regulating to further those objectives, the states must consider not only the privacy interest of the minor, but also her welfare and the constitutionality recognized role that parents have in the custody, care, and nuture of their children. *See generally H.L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981). Because each of these interests must be accommodated, the states cannot be required to fine tune every enactment to protect only the minors' privacy interests.

In this case, the State's interest in encouraging consultation is enhanced by the importance of the abortion decision, its attendant emotional and psychological implications, and the legitimate claim of parents to direct the care and upbringing of their children. In light of those factors, a brief waiting period, designed to provide a meaningful opportunity for discussion, cannot be viewed as an unreasonable means to attain the State's objectives of protecting family integrity and ensuring a well-informed decision.

4. The Seventh Circuit Erroneously Held That The Act Was Unduly Burdensome Because It Did Not Provide An Exception To Notification For Mature Minors And Immature Minors Whose Best Interests Require An Abortion.

Under Section 4(a) of the Act, the person performing an abortion or his agent must give "at least 24 hours actual notice to both parents or to the legal guardian" before performing an abortion upon an unemancipated minor. Ill. Rev. Stat. ch. 38, ¶ 81-64(a) (West Supp. 1984). However, notice may be waived altogether if the minor petitions the circuit court and demonstrates that she is mature or that notice would not be in her best interests. Ill. Rev. Stat. ch. 38, ¶ 81-65(d) (West Supp. 1984). The waiting period only attaches when notification is required. If a minor is found to be mature or to be one whose best interests dictate waiver of notification, no waiting period is required prior to the abortion.

Further, even if a minor chooses not to pursue the judicial alternative to notification or her petition is denied, the waiting period may be by-passed if her parents have been notified and they either accompany her to the place where the abortion is to be performed or they submit notarized statements indicating that they have been notified. Ill. Rev. Stat. ch. 38, ¶ 87-67(a) (West Supp. 1984).

As this scheme demonstrates, the twenty-four-hour waiting period need not apply to all minors. Every minor is free to apply for waiver of notification and, under the Act, is provided with the assistance of a guardian ad litem and court-appointed counsel. Ill. Rev. Stat. ch. 38, ¶¶ 81-64(c), 81-65(a) and (b) (West Supp. 1984). While the circuit court may deny a minor's petition, it does so only upon a finding that the minor is either not mature enough to make the decision on her own or, if she is immature, that failure

to notify her parents is not in her best interests. Ill. Rev. Stat. ch. 38, ¶ 81-65 (West Supp. 1984). Thus, the Act need only apply to those minors who choose to forego the judicial alternative set out in the Act or to those who are unsuccessful in obtaining a waiver of notice through judicial proceedings.

Those minors who fall within the first category will not be unduly encumbered by the short waiting period. If they have not notified their parents in advance, the waiting period will provide, as it was designed to do, an opportunity for meaningful consultation. If they have, and they wish to avoid the twenty-four-hour delay, they may arrange for their parents to accompany them or bring their statements to the place where the abortion is performed. Ill. Rev. Stat. ch. 38, ¶ 81-67(a) (West Supp. 1984).

Those minors who fall within the second category are *a fortiori* a class most in need of parental consultation. An independent assessment has been made that they are not mature enough to evaluate, without parental guidance, the numerous factors that go into the abortion decision or that their best interests would not be served by allowing them to make such a serious decision on their own. Since they are in special need of assistance, a short waiting period, designed to ensure that they in fact obtain it, is closely correlated with the State's asserted interest.

In summary, the Seventh Circuit improperly evaluated the privacy interests of the minor, and the countervailing interests of the parents and the State. It compounded its error by invoking a level of scrutiny not recognized by this Court as applicable to regulations affecting minors' abortion decisions.

III.

THE SEVENTH CIRCUIT ERRONEOUSLY ENJOINED ENFORCEMENT OF THE ILLINOIS PARENTAL NOTICE OF ABORTION ACT BECAUSE THE ACT PROVIDES AN ADEQUATE FRAMEWORK FOR EXPEDITIOUS AND CONFIDENTIAL APPEALS.

The Illinois Act compares favorably with the Missouri statute that this Court upheld in *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983). Yet, the Seventh Circuit enjoined the Act until the Illinois Supreme Court promulgates rules for expeditious and confidential appeals. That decision ignores *Ashcroft*'s clear direction to accord proper deference to the willingness of state courts to act in accordance with constitutional mandates. Further, the Court of Appeals improperly concluded that established rules of Illinois appellate practice would be insufficient in combination with the Act's provisions to ensure compliance with constitutional requirements.

In *Ashcroft*, this Court upheld a statute that had been enjoined prior to its effective date, observing that there had been no need for the Missouri Supreme Court to promulgate appellate rules. It concluded that "[t]here is no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions." 462 U.S. at 491 n.16, 103 S.Ct. at 2525 n.16, 76 L.Ed.2d at 745 n.16. Thus, despite the absence of court rules, the statute "provide[d] the framework for a constitutionally sufficient means of expediting judicial proceedings." *Id.*

Like the Missouri statute, the Illinois Act has never been operative, so there has been no need for the Illinois Supreme Court to promulgate special rules pursuant to the Act. The presumption that the State court will act in compliance with this Court's mandates is equally appli-

cable here. This is so, for not only does the Illinois Act, like Missouri's, confer a right to an expedited, confidential appeal, but existing rules of appellate practice provide for them.

Illinois Supreme Court Rule 303(a)(4) requires the clerk of the circuit court to transmit the notice of appeal to the appellate court within five days. Ill. Rev. Stat. ch. 110A, ¶ 303(a)(4) (1983). When the clerk of the appellate court receives a copy of the notice of appeal, he must enter the appeal on the docket. Ill. Rev. Stat. ch. 110A, ¶ 303(f) (1983). Under Rule 311, "the parties may [then] agree to have their case placed on an accelerated docket . . . and may provide for submission of an agreed statement of facts in lieu of a record, and memoranda in lieu of formal briefs." Ill. Rev. Stat. ch. 110A, ¶ 311 (1983). The court may order "an expedited schedule for the disposition of the appeal." *Id.*

Under these rules, a minor who files her notice of appeal immediately would have her appeal docketed within five days of an adverse judgment. Because there is only one party to these proceedings, the minor's counsel need not obtain the agreement of any other party and, under Rule 311, may unilaterally petition the court to expedite the appeal, allow the filing of a statement of facts in lieu of a record and a memorandum in lieu of a brief. Thus, Illinois law already provides a constitutionally adequate avenue for minors pursuing appeals from denials of their petitions for waiver. However, if the Illinois Supreme Court should find that additional rules are necessary, the Act requests that body to promulgate them.[6] Ill. Rev. Stat. ch. 38, ¶ 81-65(g) (West Supp. 1984). Consequently,

[6] The Act "requests" the Court to promulgate rules for appeals because, under the Illinois Constitution, the General Assembly is not authorized to dictate rules of appellate practice. ILL. CONST. art. VI, § 16.

there are adequate reasons to believe that Illinois courts will comply with constitutional requirements.

The Court of Appeals ignored the plain language of the Act when it held that its provisions did not adequately ensure anonymity. From the filing of the petition in the circuit court through all of the appellate stages, the Act guarantees confidential proceedings. Section 5(c) provides that all "court proceedings" under this Section "shall be confidential and shall ensure the anonymity of the minor or incompetent." Ill. Rev. Stat. ch. 38, ¶ 81-65(c) (West Supp. 1984). The reference to "court proceedings" is surely broad enough to include appellate courts and "under this Section" encompasses all of Section 5's subparts. *See, e.g.*, Ill. Rev. Stat. ch. 38, ¶ 81-65(h) (West Supp. 1984) (eliminating filing fees for "procedures provided by this Section"). Section 5(e) requires "[a] court that conducts proceedings under this Section" to "order that a confidential record of the evidence be maintained." Ill. Rev. Stat. ch. 38, ¶ 81-65(e) (West Supp. 1984). Even more specifically, the Act provides for a "confidential appeal . . . as the Supreme Court provides by rule," Ill. Rev. Stat. ch. 38, ¶ 81-65(f) (West Supp. 1984), and invites the Illinois Supreme Court to issue more specific directives if necessary. Ill. Rev. Stat. ch. 38, ¶ 81-65(g) (West Supp. 1984).

Those sections, reflecting an intent to prevent disclosures, would not be interpreted by Illinois courts to require less stringent standards on appeal than are required in the trial court. *See, e.g., Huckaba v. Cox*, 14 Ill.2d 126, 150 N.E.2d 832 (1958); *People ex rel. Walgenbach*, 117 Ill. App. 3d 14, 452 N.E.2d 760 (1983). It certainly cannot be assumed that Illinois courts would permit the minor's identity to be revealed on appeal when the intent of the Act is so plainly to safeguard against disclosure of her identity. Moreover, there is no reason to believe that those courts would act so obviously inconsistently with constitutional mandates.

In short, the Seventh Circuit failed to follow *Ashcroft*'s guidelines in assessing the judicial alternative provided in the Act. In so doing, it gave inadequate deference to Illinois courts' willingness to follow this Court's decisions. It also failed to take into account the need for flexibility in adopting waiver procedures in conformance with the State's existing rules and practices.

CONCLUSION

For all of the foregoing reasons, appellant Hartigan believes that the questions presented by this appeal are substantial and of broad importance and application. Appellant, therefore, respectfully urges this Honorable Court to give this case its full consideration and to uphold the Illinois Parental Notice of Abortion Act of 1983 in its entirety.

Respectfully submitted,

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APPENDIX

No. 85-673

Supreme Court, U.S.
FILED
OCT 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and **RICHARD M. DALEY**, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and **ALLAN G. CHARLES**, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO JURISDICTIONAL STATEMENT

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 84-1958 and 84-1959

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees,

v.

NEIL HARTIGAN, in his official capacity as Attorney General of the State of Illinois, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois, their agents and successors, and all others similarly situated,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 84 C 771—**Hubert L. Will**, *Judge.*

ARGUED FEBRUARY 19, 1985—DECIDED MAY 20, 1985

Before BAUER, COFFEY, *Circuit Judges*, and BROWN, *Senior District Judge.**

BAUER, *Circuit Judge.* This appeal concerns the constitutionality of Illinois' Parental Notice Abortion Act of 1983 (the Act). The district court found that the twenty-four hour waiting period imposed by Section 4(a) of the Act was unconstitutional because it unduly burdened the minor's right to have an abortion in the absence of a

* The honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

compelling state interest. *Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1458-59 (N.D. Ill. 1982). The district court also found that the judicial procedures contained in Section 5 of the Act permitting waiver of notice to the minor's parents were unconstitutional because they failed to assure the expeditious and confidential disposition of the proceedings at the trial level and on appeal. 584 F. Supp. at 1460-62. The district court held that these provisions were not severable from the Act because without them the Act would have little "operative significance," and therefore declared the entire Act unconstitutional. *Id.* at 1464. Appellants appeal these holdings.

We affirm the district court's holding that the twenty-four hour waiting period imposed by Section 4(a) is unconstitutional. We vacate, however, the district court's holding that the provisions relating to the waiting period are not severable, and accordingly we sever those provisions from the Act. We also vacate the district court's holding that the judicial procedures permitting waiver of notification provided for under Section 5 are unconstitutional, but enjoin enforcement of the Act until the Illinois Supreme Court promulgates rules which assure the expeditious and confidential disposition of the waiver of notice proceedings at trial and on appeal.

I. Statement of Facts

On November 2, 1983, the Illinois General Assembly enacted the Illinois Parental Notice of Abortion Act of 1983, P.A. 83-890, overriding the veto of Governor James Thompson. On January 26, 1984, plaintiffs filed a class action suit in federal court challenging the constitutionality of the Act. On that date the district court entered a temporary restraining order enjoining enforcement of the Act.

The district court subsequently certified both plaintiff and defendant classes. The plaintiff class consists of all licensed physicians presently performing or desiring to perform abortions for unemancipated minors and disabled

persons in Illinois and all unemancipated minors capable of giving informed consent to an abortion or whose best interests would not be served by notice to both parents. The defendant class consists of all the State's Attorneys of the various counties in Illinois.

On May 4, 1984, the district court granted plaintiffs' motion for summary judgment, declaring the Act unconstitutional and permanently enjoining its enforcement. The district court found that the twenty-four hour waiting period imposed by the Act after a minor had notified both parents of her decision to have an abortion unconstitutionally burdened her right to have an abortion. The district court also found that the judicial alternative to notice provided by the Act was unconstitutional because it failed to assure that the proceedings would be conducted expeditiously and confidentially. The district court upheld the other provisions of the Act, but found that it could not sever the unconstitutional provisions without eviscerating the Act, and therefore declared the entire Act unconstitutional.

On June 30, 1984, the Illinois General Assembly amended the Act to provide that the waiver of notice proceedings "shall insure anonymity" and added a severability clause to the Act. P.A. 83-1128. These amendments were immediately enjoined. Defendants then filed this appeal, challenging the district court's holdings.

II. The Twenty-Four Hour Waiting Period

In *City of Akron v. Akron Center for Reproductive Health*, ____ U.S. ____, 103 S. Ct. 2481 (1983), the Supreme Court struck down an ordinance which imposed a twenty-four hour waiting period on women who had, pursuant to the ordinance, given written consent to obtain an abortion. 103 S. Ct. at 2503. The stated purpose underlying the waiting period was to allow a woman time to reflect upon her decision to have an abortion, thereby making a more "informed" decision. The Court found that this provision imposed a burden on women seeking to

obtain an abortion and that the state had failed to demonstrate that the waiting period furthered any legitimate state interest. *Id.* at 2503. Therefore, the Court held that the provision was unconstitutional.

Although the ordinance struck down in *Akron* applied to both adults and minors, the Supreme Court has not specifically addressed the application of waiting periods only to minors or weighed the state's interest in promoting parental consultation with a minor who seeks to obtain an abortion against the burdens imposed on minors by a waiting period. The *Akron* court also stated that, in view of the unique status of children under the law, states have a "significant" interest in certain abortion regulations aimed at protecting children which is not present when the state seeks to regulate adults. *Akron*, 103 S. Ct. 2491 n.10 (citing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 75 (1976)). The holding in *Akron*, therefore, may not apply to minors. In view of the other case law in this area, however, including several cases from this circuit, it is apparent that the Supreme Court's prohibition of waiting periods in abortion statutes also extends to statutes which regulate only minors.

The constitutional rights of minors do not receive lesser protection than the rights of adults. *Danforth*, 428 U.S. at 74 (citations omitted); *Charles v. Carey*, 627 F.2d 772, 785 (7th Cir. 1980). Similarly, the burdens imposed by state regulation of abortion are no different for minors than for adults. *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (*Bellotti II*); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983); *Wynn v. Carey*, 599 F.2d 193, 196 n.6 (7th Cir. 1979). Rather, the difference between abortion statutes which regulate adults and those which regulate only minors is that the state may have a significant interest promoted by a statute which regulates minors, but would have no legitimate interest in applying that statute to adults. *Akron*, 103 S. Ct. at 2491 n.10; *Danforth*, 428 U.S. at 75. For example, the state has a legitimate interest in promoting parental consultation with a minor who is seeking to obtain an abortion because

of the minor's presumed inability to make important decisions in an informed, mature manner and the serious concerns implicated by a decision to have an abortion. *Bellotti II*, 443 U.S. at 634. The state has no legitimate interest, however, in promoting such consultation when the woman seeking an abortion is mature. *Akron*, 103 S. Ct. 2497.

The state clearly has a significant interest in promoting parental consultation with a minor before her decision to have an abortion. *Akron*, 103 S. Ct. at 2491 n.10; *H.L. v. Matheson*, 450 U.S. 398, 409-10 (1981) (quoting *Bellotti II*, 443 U.S. at 640-41); *Pearson*, 716 F.2d at 1143. On the other hand, a mature minor or an immature minor in whose best interest it is to have an abortion has a constitutional right to have an abortion without notifying her parents. *Matheson*, 450 U.S. at 420 (Powell, J., concurring); *Bellotti II*, 443 U.S. at 647. *Accord Akron*, 103 S. Ct. at 2497-98 (parental consent statute); *Planned Parenthood, Kansas City, Mo., Inc. v. Ashcroft*, ___ U.S. ___, 103 S. Ct. 2517, 2525 (1983) (parental consent statute). In balancing these two rights, the Supreme Court upheld a parental notification statute in *Matheson* because that statute promoted the state's interest in parental consultation with a minor without unduly burdening a minor's right to have an abortion. *Matheson*, 450 U.S. at 413. *Accord Ashcroft*, 103 S. Ct. 2517 (1983) (upholding parental consent statute).

Neither the parental notification statute which the Court upheld in *Matheson* nor the parental consent statute which the Court upheld in *Ashcroft* requires a waiting period after notification or consent is effected. It is also worth noting that in *Ashcroft* the state did not appeal the Eighth Circuit's holding that the Missouri statute's forty-eight hour waiting period was unconstitutional. *Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 103 S. Ct. 2517 (1983) (waiting period severed from statute). We have been able to find only one case in which a waiting period has been upheld, *Wolfe v. Schoering*, 541 F.2d 523, 526 (6th Cir. 1976), and that

holding was subsequently overruled by the Sixth Circuit in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 651 F.2d 1198, 1208 (6th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 103 S. Ct. 2481 (1983). Moreover, a plethora of cases have struck down provisions imposing a waiting period. *See, e.g., Akron*, 103 S. Ct. at 2503 (parental consent statute); *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984) (parental consent and informed consent statute); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983) (parental notification statute); *Women's Services P.C. v. Thone*, 690 F.2d 667, 668 (8th Cir. 1982) *vacated sub nom. for further consideration in light of Akron, Kerrey v. Women's Services P.C.*, 103 S. Ct. 3102 (1983) (parental notification statute); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1014-16 (1st Cir. 1981) (parental consent and informed consent statute); *Charles v. Carey*, 627 F.2d 772, 786 (7th Cir. 1980) (informed consent statute); *Wynn v. Carey*, 599 F.2d 193, 196 (7th Cir. 1979) (parental consent statute); *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F. Supp. 1137, 1147 (D.R.I. 1982) (informed consent statute); *Leigh v. Olson*, 497 F. Supp. 1340, 1348 (D.N.D. 1980) (parental notification and informed consent statute); *Margaret S. v. Edwards*, 488 F. Supp. 181, 212 (E.D. La. 1980) (parental notification and informed consent statute); *Women's Community Health Center v. Cohen*, 477 F. Supp. 542, 551 (D. Me. 1979) (informed consent statute).

These cases hold that a waiting period places a direct and substantial burden on women who seek to obtain an abortion. This burden is the same for minors as for adults, *Bellotti II*, 443 U.S. at 642; *Charles v. Carey*, 627 F.2d at 785, and therefore "the same objections to the waiting periods for adults listed in *City of Akron* apply to waiting periods for minors." *Pearson*, 716 F.2d at 1143. The burden imposed by a waiting period has been reiterated with little variation in these cases. The District Court of Rhode Island cogently discussed several factors which it considered part of this burden in *Women's Medical Center of Providence, Inc. v. Roberts, supra*, stating

> Although a mere twenty-four hour delay by itself may not increase the risk of an abortion to a statistically significant degree, the record in this litigation shows that the mandatory wait may combine with other scheduling factors such as doctor availability, work commitments, or sick leave availability, to increase the actual waiting period to a week or more .... [I]t is uncontested that delays of a week or more do indeed increase the risk of abortion to a statistically significant degree .... Furthermore, a delay of even twenty-four hours may push a woman into the second trimester, thus requiring that the operation be performed in a hospital, and significantly increasing the procedure's cost, inconvenience, and, of course, risk.

530 F. Supp. at 1146.[1]

Courts have also noted that difficulties in scheduling may be complicated by the distance which a woman may have to travel in order to obtain an abortion. An extreme example of this was before the District Court of North Dakota in *Leigh v. Olson, supra*, in which the district court found that only one doctor in the entire state performed abortions and that women in certain parts of the state would have to drive some 400 miles in order to obtain an abortion. 497 F. Supp. at 1347. Finally, the cases cited above have noted that a waiting period may result in additional mental anguish for a significant number of women seeking abortions. *See, e.g., Leigh v. Olson*, 497 F. Supp. at 1347 n.8 and accompanying text.

Because a waiting period places a direct and substantial burden on women who seek to obtain an abortion, the state is required to prove that the regulation is "narrowly drawn to further a compelling interest." *Charles v. Carey*, 627 F.2d at 785. *Accord Akron*, 103 S. Ct. at 2495; *Doe v.*

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[1] In Illinois a second trimester abortion also must be performed in a hospital on an inpatient basis. *See* 38 Ill. Rev. Stats. ¶ 81-24 § 4 (1983).

Bolton, 410 U.S. 179, 195 (1974). Although it is not disputed that the state's interest in promoting parental consultation with a minor who seeks to obtain an abortion is significant, this Circuit has held that the state's interest is insufficient to impose a waiting period in light of the burden it places on the minor's right to obtain an abortion. *Pearson*, 716 F.2d at 1143. *Accord Wynn v. Carey*, 599 F.2d at 196. Mere parental notification, however, promotes the state's interest in parental consultation and is not unduly burdensome if it provides an exception to parental notification for mature minors and immature minors whose best interests require an abortion. *Akron*, 103 S. Ct. at 2497-98; *Ashcroft*, 103 S. Ct. at 2525; *Pearson*, 716 F.2d at 1132. Moreover, in *Pearson* we noted that "[n]otification itself in most cases should lead to parental consultation without the state's additional help because minors are particularly susceptible to parental wishes." 716 F.2d at 1132. Thus, it appears that a mandatory waiting period is unconstitutional for two reasons; first, it imposes a far greater burden on a minor's rights than a parental notification requirement which provides an exception to notification for mature minors and immature minors whose best interests require an abortion, and second, it does not significantly further the state's interest in promoting parental consultation when combined with a notification requirement, which itself promotes that interest.

In view of the case law, the waiting requirement imposed by Section 4 of Illinois' 1983 Parental Notice Abortion Act, standing alone, is unconstitutional. The state argues, however, that the waiting period is not mandatory, and hence, not unconstitutional, because of the provisions of Section 7 of the Act. Section 7 provides that the twenty-four hour waiting requirement imposed by Section 4 does not apply when the minor's parents have been notified of the minor's decision to obtain an abortion and both parents either accompany the minor to the place where the abortion is to be performed or "submit signed notarized statements indicating that they have been notified," presumably to the doctor who is to perform the

abortion. The question before this court, therefore, is whether the provisions of Section 7 remove the constitutional infirmity from the waiting period imposed by Section 4.

As noted above, one reason that a waiting period is unconstitutional is because of the undue burden which it places on a woman's right to obtain an abortion. A proper initial question might then be whether the provisions of Section 7 alleviate in any way the burden imposed by Section 4. In order to avoid the strictures of Section 4, Section 7 requires a minor to coordinate the activities of both her parents to accompany her to an abortion clinic or to appear before a notary to sign a statement. These requirements, rather than alleviating the burden imposed by a waiting period, seem to increase it. The problems of scheduling, travel, and expense inherent in a waiting period will increase threefold if a minor's parents are required to accompany her to the abortion clinic or to make arrangements to appear before a notary. Thus, the requirements of Section 7 are more likely to result in greater delay in obtaining an abortion after a minor has notified her parents than the twenty-four hour wait imposed by Section 4. Therefore, Section 7 does not alleviate the burden imposed by Section 4, but merely offers an alternative, and apparently greater, burden to that which the case law holds unconstitutional.

Moreover, Section 7 does not seem to cure the defects of a waiting period which this Circuit addressed in *Pearson*. In *Pearson*, we found that the Indiana statute's waiting period was unconstitutionally "arbitrary and inflexible because it applies both to minors whose parents have been notified within the time period and object and those whose parents have already expressed approval for the abortion." 716 F.2d at 1143. This same objection applies to Illinois' statute. Section 7 does not provide an exception to the waiting period for a minor whose parents approve of her decision to have an abortion; it merely provides her with an opportunity to obtain an abortion within twenty-four hours after notifying her parent's

only if she complies with further requirements. As discussed above, it is unlikely that these requirements can be fulfilled within the twenty-four waiting period. Regardless, the imposition of further burdensome requirements once notice has been effected violates the plain command of *Pearson* that "the state cannot require that an abortion be delayed once notification has been effected upon a minor's parents." 716 F.2d at 1143. *Accord Akron*, 103 S. Ct. at 2503. Thus, even if a minor could fulfill the requirements of Section 7 after only a short delay, that section is unconstitutional

In examining Section 7's effect on the second constitutional infirmity of a waiting period, whether it sufficiently furthers the state's interest in parental consultation in view of the parental notice requirement, it is evident that the provisions of Section 7 do not make a waiting period more efficacious in promoting parental consultation. The only apparent effect of Section 7 is to make it more difficult for a minor to obtain an abortion once she has notified her parents of her decision if she does not wish to submit to the burden of a twenty-four hour waiting period. Thus, it does not appear that Section 7 promotes any state interest other than perhaps the state's interest in enforcing an unconstitutional waiting period under the guise that its statute provides "exceptions" to the waiting requirement.

In sum, Section 7 does not alleviate the burden on a minor's right to have an abortion and it does not further the state's interest in promoting parental consultation. Therefore, Section 7 does not remedy the constitutional infirmity of the waiting period imposed by Section 4.

III. The Judicial Alternative to Parental Notification

As the Supreme Court stated in *City of Akron v. Akron Center for Reproductive Health*, ____ U.S. ____, 103 S. Ct. 2481 (1983), the relevant legal standards governing the adequacy of judicial alternatives to parental consent are not in dispute. 103 S. Ct. at 2497. A state's interest in

protecting immature minors is sufficient to require parental consent, but "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interest." *Akron*, 103 S. Ct. at 2497-98. *See Planned Parenthood of Kansas City, Mo., Inc. v. Ashcroft*, ____ U.S. ____, 103 S. Ct. 2517, 2525 (1983); *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (*Bellotti II*). This standard also governs provisions requiring parental notification. *Bellotti II*, 443 U.S. at 651; *Pearson*, 716 F.2d at 1132. Illinois' Parental Notice Abortion Act does provide a judicial procedure for waiver of the parental notification requirement. The issue before this court is therefore whether the Illinois statute's judicial alternative is constitutionally sufficient. *See Ashcroft*, 103 S. Ct. at 2525.

In *Bellotti II*, the Supreme Court held that the judicial alternative to parental notification "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonyimity and sufficient expedition to provide an effective opportunity for an abortion to be performed." 443 U.S. at 644. *See Ashcroft*, 103 S. Ct. at 2525 n.16. Appellees do not contest the sufficiency of the procedures established in Section 5 for making the determination that a minor is mature or that, if the court finds that she is immature, an abortion is nonetheless in her best interests. Section 5(e) provides that the court "shall issue written and specific factual findings and legal conclusions supporting its decision." It is also uncontested that Section 5 provides that the hearing shall be held and a decision rendered with sufficient expediency. Section 5(c) provides that "in no case shall the court fail to rule within 48 hours of the time of application." Rather, the dispute is whether Sections 5(f) and (g) sufficiently provide for an expedited appeal of the court's decision.

Section 5(f) provides that "[a]n expedited confidential appeal shall be available as the Supreme Court provides by rule ...." Section 5(g) further states that

"[t]he Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner." Moreover, the state contends that expedited appeals are currently available to minors pursuant to Illinois Supreme Court Rules 303 and 311, and that therefore the judicial alternative to parental notification is adequate even if the Illinois Supreme Court feels "that additional rules are unnecessary at this time." Appellant's Br. at 25.

In *Ashcroft*, the United States Supreme Court upheld the Missouri parental consent statute's provision providing for expeditious appeals, which provided that

> The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

Mo. Rev. Stat. § 188.028.2(6) (Supp. 1982).

The Court held that "this section provides the framework for a constitutionally sufficient means of expediting judicial proceedings." 103 S. Ct. at 2525 n.16. Although the state supreme court had not promulgated any rules assuring expediency at the time the case was heard because the district court had enjoined enforcement of the statute immediately after it went into effect, the Court stated that it had "no reason to believe that Missouri will not expedite any appeal consistent with the mandate in our prior opinions." *Id.*

The Illinois statute does not provide any regulation of appellate procedure, such as the twenty-four hour and five day limitations imposed by the Missouri statute. The Illinois Constitution, however, prohibits the state legislature from making specific rules governing appellate

procedure. These rules may only be enacted by the Illinois Supreme Court. *See* ILL. CONST. art. VI, § 16. Thus, the issue is whether Section 5's general instructions to the Illinois Supreme Court to promulgate rules providing for the expeditious and confidential appeal of decisions under the Act provide "the framework for a constitutionally sufficient means of expediting" the appeal.

The Court's language in *Ashcroft* that the Missouri statute's provisions were sufficient because it had "no reason to believe that Missouri will not expedite any appeal consistent with the mandate in [the Supreme Court's] prior opinions" indicates that the Court is willing to allow a state supreme court the opportunity to enact constitutional rules governing appeals before it will strike down the statute for failing to provide a judicial alternative to parental notification. Because of the Illinois legislature's constitutional inability to prescribe such rules, this approach is logical in this case. This approach also appears to be consistent with this Circuit's holding in *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983), which struck down an Indiana parental notification statute because, among other grounds, it did not "even mention appeals." 716 F.2d at 1135. The *Pearson* court stated that if the statute had "at least directed the Indiana Supreme Court to promulgate rules governing expedited appeals, we would be satisfied." 716 F.2d at 1136.

On the other hand, the Third Circuit, in addressing the constitutionality of the Pennsylvania Abortion Control Act, stated that "in light of the ... Act's provision requiring the Supreme Court of Pennsylvania to promulgate rules assuring confidentiality and promptness of disposition, we cannot hold that the provision is constitutional." *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 297 (3d Cir. 1984). Citing *Ashcroft*, the Third Circuit stated that "[t]o pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely solely on generally stated principles of availability, confidentiality, and form." 737 F.2d at 297. Because the

Pennsylvania Supreme Court had not yet enacted "any rules to fill the gaps of the . . . statute," the Third Circuit did not invalidate the provision, but enjoined its enforcement until the state court promulgated such rules. *Id.*

The Third Circuit's concern that it could not rule on the constitutionality of the provision because it was, in essence, incomplete seems to be echoed in this Circuit's decision in *Pearson*. The *Pearson* court's concern with the Indiana statute was that in the absence of any rules governing appeal, "the only assurance we have that Indiana courts will expedite appeals is the state's assertion that they will." 716 F.2d at 1136-37. Similarly, the Illinois statute provides no rules for the filing or perfection of appeals, as did the Missouri statute addressed in *Ashcroft*, but more closely resembles the provision which the Third Circuit considered in *Thornburgh*.

Despite the complete absence of rules governing appeals in the Illinois statute, it appears that under *Ashcroft* the constitutionality of the judicial alternative provided for under Section 5 should not be determined until the Illinois Supreme Court has had an opportunity to promulgate rules governing appeals. It is difficult to see how the absence of such rules provides the framework for a constitutionally sufficient means of expediting the appeal which would require upholding the provision without any further action by the Illinois Supreme Court. It is also difficult to see how a mere request for such rules provides the necessary framework. Rather, the provision is incomplete until the Illinois Supreme Court has promulgated rules providing for an expedited appeal. Because time is of the essence in an abortion decision, *H.L. v. Matheson*, 450 U.S. 398, 412 (1981), the absence of such rules is a fundamental defect in Section 5 and the statute should therefore be enjoined, as was done by the Third Circuit in *Thornburgh*, until such rules are enacted and the Act can be reviewed in its entirety. As a practical matter, enjoining enforcement of the Act will prevent the statute's application to minors before adequate appellate recourse is available.

The state contends that the Act's failure to provide rules governing appeal is irrelevant because the opportunity for an expedited appeal already exists under Illinois Supreme Court Rules 303 and 311. Rules 303(a)(4) provides that "[w]ithin five days after the filing of the notice of appeal . . . the clerk of the circuit court shall transmit to the clerk of the court to which the appeal is being taken a copy of the notice of appeal." The notice of appeal is then entered on the docket of the reviewing court upon receipt by that court's clerk pursuant to Rule 303(f). Rule 311 provides that "the parties may agree to have their case placed on an accelerated docket . . . and may provide for submission of an agreed statement of facts in lieu of a record, and memoranda in lieu of formal briefs." The reviewing court "may then enter an order setting forth an expedited schedule for the disposition of the appeal." 110A Ill. Rev. Stats. § 311 (1982).

The Illinois Supreme Court Rules which are already in effect differ in several respects from the provisions of the Missouri statute which the United States Supreme Court approved in *Ashcroft*. The Missouri statute stated that the record shall be completed and the appeal perfected within five days of filing the notice of appeal. *Ashcroft*, 103 S. Ct. at 2525 n.16. Rule 303 merely provides that the notice of appeal shall be transferred to the reviewing court and docketed within that same time. The minor seeking an abortion must then place the case on an accelerated docket, and presumably petition the reviewing court for an expedited hearing pursuant to Rule 311. Moreover, the Missouri statute expressly commands the Missouri Supreme Court to provide for expedited appeals. Rule 311, however, does not require an expedited hearing, but merely gives the reviewing court discretion to grant such a hearing. The *Pearson* court considered such discretion as a factor in determining that the Indiana Rules of Appellate Procedure did not assure an expeditious hearing on appeal. 716 F.2d at 1136.

The Illinois Supreme Court Rules do not require that the appeal be heard as quickly as under the Missouri

statute upheld in *Ashcroft*. This appears to be a crucial factor since time is of the essence. Moreover, the request for rules ensuring the expeditious disposition of appeals in Section 5(g) indicates that the legislature did not intend for the existing Illinois Supreme Court Rules to suffice for appeals under the Act. Contrary to appellant's assertions, Section 5(g) indicates that the legislature did not believe that the existing rules are constitutionally sufficient. Further, the discretionary nature of Rule 311 does not assure that the appeal will be heard expeditiously. Although the Illinois Supreme Court Rules unquestionably give a minor seeking an abortion the opportunity to have an expeditious hearing, the United States Supreme Court's holdings require that the rules governing appeals assure that such a hearing will occur. *Ashcroft*, 103 S. Ct. 2525 n.16; *Bellotti II*, 443 U.S. at 644. The existing Illinois Supreme Court Rules do not meet this standard.

The district court also ruled that the Illinois parental notification statute was unconstitutional because it failed to assure the anonymity of the minor at the waiver of notice hearing or on appeal. Before addressing this issue, however, both parties contest which language in Section 5(c) is properly before this court for review. Appellees contend that review of only the language of the section as it existed at the time suit was filed is proper. At the time suit was filed, Section 5(c) required only that the waiver proceeding "shall be confidential." Subsequently, the Illinois legislature amended Section 5(c) to add the requirement that the waiver proceedings shall be conducted to "ensure the anonymity of the minor." In view of the Supreme Court's seemingly interchangeable use of the terms "confidentiality" and "anonymity," which is discussed below, the difference between the section as enacted and as amended does not seem significant for the purposes of our review. Nonetheless, review of a statute as amended, when the amendment occurred after an injunction was entered prohibiting enforcement of the statute, was held proper in *Bionic Auto Parts and Sales, Inc. v. Fahner*, 721 F.2d 1072, 1076-77 (7th Cir. 1983). Appellees cite *Charles v. Daley*, 83-3175 (7th Cir. Nov. 30,

1984), for the proposition that review must be limited to the language of Section 5(c) at the time suit was filed. In *Charles v. Daley*, however, the district court did consider amendments to provisions enacted after the statute was enjoined, slip op. at 4-5, but refused to consider even later amendments which were the subject of a separate lawsuit. *Id.* Thus, it appears that consideration of Section 5(c) as amended is proper.

The proceedings at which a minor may prove her maturity or that, if immature, an abortion is in her best interests "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity . . . ." *Bellotti II*, 443 U.S. at 644. *See Ashcroft*, 103 S. Ct. at 2525 n.16. This court has stated that confidentiality during and after this proceeding is essential to ensure that a minor will not be deterred from exercising her right to a hearing because of fear that her parents may be notified. *Pearson*, 716 F.2d at 1141. *Accord Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Leigh v. Olson*, 497 F. Supp. at 1349; *Margaret S. v. Edwards*, 488 F. Supp. at 204. This issue has most often arisen in the context of statutes which require parental notification in every case, regardless of the minor's maturity or whether an abortion would be in her best interests. *See, e.g., Bellotti II*, 443 U.S. at 651; *Danforth*, 428 U.S at 81; *Pearson*, 716 F.2d at 1141. The issue in this case, whether the statute's provisions specifically provide for, and thus assure, anonymity during a waiver of notice hearing, has received little attention.

The Supreme Court addressed this issue directly in *Ashcroft*, but without elaboration. The Missouri statute before the Court in *Ashcroft* provided that the minor may use her initials on the petition requesting waiver of consent. The Court held that this provision was sufficient to assure confidentiality, thus meeting the standard enunciated in *Bellotti II*. *Ashcroft*, 103 S. Ct. at 2525 n.16. The Court appeared to use the terms "anonymity" and "confidentiality" interchangeably. *Id.*

Similarly, in *Bellotti II* the Massachusetts Supreme Court, upon certification of the issue from the district court, approved of the provisions of the Massachusetts statute regarding confidentiality, stating that "[t]he proceeding need not be brought in the minor's name, and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents." *Baird v. Attorney General*, 371 Mass. 741, 757-58, 360 N.E.2d 288, 298 (1977). After citing to this language upon review, the United States Supreme Court stated that these safeguards "avoid much of what was objectionable in the statute successfully challenged in *Danforth*." *Bellotti II*, 443 U.S. at 645, but the Court nonetheless struck down the Massachusetts statute because it required parental notification in every case. *Id.* at 651. Although the Massachusetts Supreme Court's assurance that the proceeding would be confidential was challenged on appeal, no evidence was presented as to the operation of the proceedings because the statute was enjoined prior to enforcement, and therefore the Court assumed that the Massachusetts Supreme Court's judgment was correct. *Id.* at 645 n.25.

The Third Circuit applied the Supreme Court's holdings in *Ashcroft* and *Bellotti II* to a provision in Pennsylvania's parental consent statute which required the state supreme court "to promulgate rules assuring confidentiality." *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 297 (3d Cir. 1984). The Third Circuit's criticism of the Pennsylvania statute's lack of specificity in providing for the expeditious disposition of the waiver of notification hearing was also directed at the statute's failure to enact specific rules assuring confidentiality. As stated above, the Third Circuit enjoined enforcement of the statute until the state supreme court enacted rules "to fill in the gaps" of the statute because the mere command to promulgate rules fell short of the "detailed provisions assuring confidentiality" contained in the Missouri statute upheld in *Ashcroft*. *Thornburgh*, 737 F.2d at 297.

In addressing Illinois' parental notification statute, the district court did not consider the amended version of Section 5(c), but found the difference between "confidentiality" and "anonymity" to be "somewhat fine." 584 F. Supp. at 1461. Rather than focusing on this semantic distinction, the district court held that the Act did not assure a minor's anonymity because of the "merely precatory language requesting the Illinois Supreme Court to provide rules relating thereto." *Id.* at 1461-62. Despite appellee's contentions that confidentiality is not the equivalent of anonymity, this reasoning appears to be proper in view of the interchangeable use of the two terms in the cases discussed above. The real focus of the issue, then, is whether the Illinois statute assures a minor's anonymity during the course of the waiver proceedings with sufficient specificity.

Like the Pennsylvania statute considered in *Thornburgh*, the Illinois statute does not set forth specific rules to assure confidentiality. Section 5(c), as amended, states that the waiver of parental notification proceedings "shall be confidential *and shall ensure the anonymity of the minor or incompetent.*" (amended portion italicized). Section 5(f) provides that "[a]n expedited confidential appeal shall be available, as the Supreme Court provides by rule . . . ." Finally, Section 5(g) requests the Illinois Supreme Court to promulgate any rules necessary to ensure that proceedings under the Act are confidential.

Unlike the statute upheld by the Supreme Court in *Ashcroft*, the Illinois statute does not make any specific provisions to assure the minor's anonymity at the waiver hearing. Further, the statute does not address particular problems concerning anonymity which exist not only during the course of the proceedings, but afterwords because of the availability of court documents and files, which are generally available to the public. *See, e.g., Roe v. Whalen*, 429 U.S. at 599-600. Thus, the Illinois statute appears to fall short of the standard set forth in *Ashcroft* and *Bellotti II* which requires the statute to assure confidentiality. As stated above, however, the Illinois legisla-

ture is prohibited by the state constitution from prescribing appellate procedure, and its power is therefore limited to Section 5(g)'s instruction to the Illinois Supreme Court to promulgate rules regarding appellate procedure. Further, although the statute merely requests the Illinois Supreme Court to promulgate rules assuring that the initial waiver proceeding will be confidential, the United States Supreme Court and the Third Circuit have both expressed a willingness to allow the state supreme court to promulgate constitutional rules before striking down the statute. *Ashcroft*, 103 S. Ct. at 2525 n.16; *Thornburgh*, 737 F.2d at 297. Therefore, as in *Thornburgh*, the proper course of action would appear to be to enjoin enforcement of the statute until the Illinois Supreme Court promulgates rules assuring confidentiality. This would comport with the Illinois legislature's expressed intention that such rules be promulgated and would allow a complete review of the statute to determine its constitutionality.

IV. The "Other Considerations" Discussed by the District Court

At the end of his opinion the trial judge addressed several issues under the heading "Other Considerations." The trial judge stated that these issues, "though not raised explicitly by the parties, merit discussion . . . ." 584 F. Supp. at 1465-66. He then discussed what he viewed as the particular problems of the Illinois statute's provisions which impose criminal liability for recklessly violating the Act, provide for punitive damages in "an appropriate" civil suit brought for violation of the Act, and fail to provide for constructive notice should a minor be unable to notify her parents or someone standing in *loco parentis*. These issues were not litigated by the parties and the district court's discourse regarding these issues did not reach any holdings of law. In short, these issues were not part of the district court's decision.

It is well-settled that a ground for reversal cannot be

presented for the first time on appeal. *International Travellers Cheque Co. v. Bankamerica Corp.*, 660 F.2d 215, 225 (7th Cir. 1981); *Textile Banking Co. v. Rentschler*, 657 F.2d 844, 853 (7th Cir. 1981); *Stern v. United States Gypsum Co.*, 547 F.2d 1329, 1333-34 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977). Narrow exceptions to this rule exist when a jurisdictional question is raised or in "exceptional circumstances where justice demands more flexibility." *Id.* This rule applies where the issue was not raised by the parties below in the pleadings or in argument. *United States v. Miroff*, 353 F.2d 481, 483-84 (7th Cir. 1965); *Beckman Instruments, Inc. v. Coleman Instruments, Inc.*, 338 F.2d 573, 576-77 (7th Cir. 1964). Even if the issue is contained in a pleading, the rule may apply if the issue was not argued at trial. *King v. Stevenson*, 445 F.2d 565, 570-71 (7th Cir. 1971).

In the case at bar the record indicates that the "Other Considerations" discussed by the district court were not argued at trial and were not the basis of the district court's decision declaring the Illinois statute unconstitutional. Moreover, the district court did not make any holding regarding these issues, but merely stated that it was troubled by problems which might arise under the provisions in question. In fact, appellees admit that in addressing these issues the district court merely "expressed its opinion." Appellee's Br. at 4. Under these circumstances, the general rule stated above applies. The issue is then whether any exceptional circumstances exist "where justice demands more flexibility." We have been unable to find any cases where such circumstances exist. In view of this fact it appears that this exception truly is narrow. Further, the circumstances of this case do not appear to demand more flexibility. Therefore, the general rule should be applied in this case, and we will not address any of the issues not argued at trial.

V. Severability

In *Immigration and Naturalization Service v. Chada*, ___ U.S. ___, 103 S. Ct. 2764 (1983), the Supreme Court

stated that unconstitutional provisions in a statute shall be severed if it appears that the legislature would have enacted the constitutional provisions of the statute independently of those provisions. 103 S. Ct. at 2774 (citing *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Illinois law contains a general severability provision which applies to any legislation promulgated after its effective date. 1 Ill. Rev. Stat. § 1032 (1981). This provision applies to any provisions which can be given effect without the invalid provisions. Further, the Illinois legislature amended the Parental Notice Abortion Act to include a similar severability clause. P.A. 83-1129, § 8.1 (June 30, 1984). It thus appears that the Illinois legislature intended the constitutional provisions of the Act to go into effect without the unconstitutional provisions.

Similarly, severance is improper if the unconstitutional provision is "an integral part of the statutory enactment viewed in its entirety." *Scheinberg v. Smith*, 659 F.2d 476, 481 (5th Cir. 1981). It appears that the provisions of the Act relating to the twenty-four hour waiting period may be severed without affecting the essential purposes of the Act. As discussed above, this provision does not appear to significantly further the state's interest in promoting parental consultation. Severance would require eliminating the words "at least 24 hours" from the provision of Section 4(a) which currently states

> "No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given *at least 24 hours* actual notice to both parents ...." (severable portion italicized.)

This omission would not effect the notice requirement, which promotes parental consultation. Severance would also require eliminating paragraph (a) of Section 7. Paragraph (a) contains the two "exceptions" to the twenty-four hour waiting period. Because it relates solely to the waiting period, its omission would not affect any

other provisions of the Act. Thus, it appears that these omissions would remove the constitutional infirmity of the statute without hindering the state's goal of promoting parental consultation through the Act. Severance is therefore proper.

VI. Conclusion

The twenty-four hour waiting period imposed by Section 4(a) is unconstitutional, but may be severed from the Act, thereby removing the constitutional infirmity of that provision from the statute without affecting the essential purpose of the Act. We therefore sever the Act's provisions relating to the waiting period. The resulting severance will leave the affected sections of the statute to read as follows:

> Section 4. Notice required. No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given actual notice to both parents ....
>
> * * *
>
> Section 7. Other exceptions. (a) [Eliminated in its entirety.]
>
> (b) Notwithstanding any other provision ....

We also vacate the district court's holding that the Act is unconstitutional. Enforcement of the statute is enjoined, however, until the Illinois Supreme Court enacts rules assuring the expeditious and confidential disposition of the judicial hearings which allow a mature minor or an immature minor whose best interests require an abortion to forego the state's notice requirement. We remand the case to the district court for a determination of the constitutionality of the waiver of notice proceedings when such rules are enacted.

COFFEY, *Circuit Judge*, dissenting. The majority declares that section 4(a) of the Illinois Parental Notice of Abortion Act of 1983 ("Act"), requiring a twenty-four hour waiting period following parental notification of a minor, unemancipated, unmarried, immature, female child's decision to have an abortion, is unconstitutional. I dissent because the majority's holding not only fails to protect the minor unemancipated child from making an uninformed, immature abortion decision but also fails to protect the constitutional right of parents to direct, supervise, and properly control the rearing of their minor children. In Illinois, as well as all other states within the Union, parents are legally responsible for the health, maintenance, support, and well-being of their minor children because such children are presumed immature and incapable of providing for themselves or making reasoned, sound judgments. An integral part of this child-rearing responsibility is the parents' right, as recognized in judicial interpretations of the Constitution, to direct the upbringing of their children. The twenty-four hour waiting period allows parents to exercise their constitutional right and participate in their minor daughter's important abortion decision, offering valuable guidance, counseling, and reasoning that will aid the child in making a mature, informed decision of whether or not to abort her pregnancy. The majority severs the twenty-four hour waiting period from the Act but enjoins enforcement of the Act until the Illinois Supreme Court promulgates rules of confidentiality and expedited appellate review in the event the minor child's application to waive parental notification is denied by the Illinois state court. I, likewise, dissent because section 5 of the Act provides the framework necessary for the expedited and confidential judicial determination of a minor unemancipated child's application to waive parental notification.

I

The record reveals that on November 2, 1983, the Illinois General Assembly passed the Parental Notice of

Abortion Act with the express intent that the Act become effective on January 31, 1984. On January 26, 1984, just five days before the Act was to become effective, the plaintiff class filed a complaint in the District Court for the Northern District of Illinois, requesting that a temporary restraining order be issued to enjoin the State of Illinois from enforcing the Act.[1] The complaint alleged, *inter alia*, that the twenty-four hour waiting period of section 4(a) and the judicial alternative to parental notification of section 5 were unconstitutional. The district court granted the temporary restraining order, preventing enforcement of the Act for a period of ten days, and on January 30, 1984, the parties agreed to extend the temporary restraining order pending resolution of the constitutional questions.

The Act provides, in relevant part, that:

"Section 4. Notice required. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician, hereinafter called the 'referring physician', certifying that the referring physician or his agent has given such notice.

* * *

Section 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in

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[1] The Parental Notice of Abortion Act of 1983 is set forth, in its entirety, in the *Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1467-71 (N.D. Ill. 1984). *See also* Ill. Rev. Stat. ch. 38, ¶ 81-61 *et seq.* (Smith-Hurd Supp. 1984-1985).

proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectively requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

* * *

Section 7. Other exceptions. (a) When the parties to whom notice must be given pursuant to Section 4 of this Act have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit signed notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply."

See Zbaraz v. Hartigan, 584 F. Supp. 1452, 1468-70 (N.D. Ill. 1984); Ill. Rev. Stat. ch. 38, ¶¶ 81-64, 81-65, 81-67 (Smith-Hurd Supp. 1984-1985).[2] On May 4, 1984, the district court ruled that the twenty-four hour waiting period of section 4(a) directly contravened this court's holding in *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) ("*Pearson*"), that "the state cannot require that an abortion be delayed once notification has been effected upon a minor's parents." 716 F.2d at 1143. The district court further ruled that the judicial alternative to parental notification set forth in section 5 of the Act did not satisfy the standards of *Planned Parenthood, Kansas City, Mo v. Ashcroft*, 103 S. Ct. 2517 (1983) ("*Ashcroft*") and *Bellotti v. Baird*, 443 U.S. 622 (1979)

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[2] On June 30, 1984, the Illinois General Assembly amended section 5(c) of the Act to provide:

> "(c) Court proceedings under this Section shall be confidential and shall *ensure the anonymity of the minor or incompetent. These proceedings shall* be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent."

1984 Ill. Leg. Serv. 270 (West) (emphasis original).

(plurality opinion) ("*Bellotti II*"), because it (1) provided "no assurance that Illinois courts will expedite appeals"; and (2) did "not safeguard a minor's or incompetent's anonymity." *Zbaraz v. Hartigan*, 584 F. Supp. at 1461-62. The court reasoned that because the twenty-four hour waiting period of section 4(a) and the judicial alternative to parental notification of section 5 were "basic" to the Act, the provisions were not severable and the entire Act was unconstitutional. *Id.* at 1464.[3] Accordingly, the district court permanently enjoined the State of Illinois from enforcing any provisions of the Act. On appeal, the issues before this court are the constitutionality of section 4(a), the twenty-four hour waiting period for minor unemancipated children, and section 5, the judicial alternative to parental notification.

II

A. TWENTY-FOUR HOUR WAITING PERIOD

The Illinois Parental Notice of Abortion Act is intended to involve parents in the abortion decision of their unemancipated, unmarried, immature, female child who has not yet reached the majority age of eighteen and who continues to depend upon her parents for maintenance

[3] The district court gratuitously addressed issues "not raised explicitly by the parties." *Zbaraz v. Hartigan*, 584 F. Supp. at 1464. The issues included the provision of section 8 that "any person . . . who intentionally, knowingly, or recklessly fails to conform to the requirement of this Act, is guilty of a class A misdemeanor"; the provision of section 8 that in a civil action under this statute, "the law of this State shall not be construed to preclude the award of *exemplary* damages"; and the definition of actual notice in section 3(c) as "giving notice directly or by telephone." *Id.* at 1465-66 (emphasis original). I agree with the majority that we need not rule on these issues, as they were never presented to the district court and thus are not properly before this court for review.

and support.[4] The Act does not attempt to regulate, much less interfere with, adult women of majority age who decide to terminate their pregnancy, nor does the Act apply to emancipated minors, those female children no longer dependent upon their parents for maintenance and support, who choose to undergo an abortion.[5] Instead, the Illinois Parental Notice of Abortion Act simply requires that when a minor, unemancipated, unmarried, female child, legally dependent upon her parents, becomes pregnant and decides to abort her pregnancy, the child's parents must be notified and afforded a twenty-four hour period to discuss the all-important abortion decision with their minor daughter. In view of the narrow application of the Act to this limited fact situation, my analysis focuses solely upon the interest of a minor unemancipated female child in making an informed, mature, well-reasoned abortion decision and the interest of parents in directing the upbringing of their minor unemancipated children.

A fundamental, bedrock principle of our society is that parents have a legal, moral, and social responsibility to provide for the health, maintenance, support, and well-being of their minor children. In the State of Illinois, any parent "who shall, without lawful excuse, desert or neglect or refuse to provide for the support or maintenance of his or her child or children under the age of 18 years, in need of such support or maintenance, shall be deemed guilty of a Class A misdemeanor . . . ." Ill. Rev. Stat. ch. 40, ¶ 1101 (1983). The State requires parents to provide their minor

[4] The Act also applies to incompetents, defined as "any person who has been adjudged a disabled person and has had a guardian appointed for her as provided for under Section 11a-3(a)(1) or Section 11a-3(3) of the Probate Act of 1975." *See* Ill. Rev. Stat. ch. 38, ¶ 81-63(e).

[5] The Act defines an emancipated minor as "any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents." Ill. Rev. Stat. ch. 38, ¶ 81-63(b).

children with the basic necessities in life and to assist the children in becoming mature adults capable of participating in, and contributing to, our society. It is widely known and accepted that minor children are incapable of making informed, mature, well-reasoned decisions during their formative years. For example, in the State of Illinois only a mature minor legally declared emancipated in an Illinois state court proceeding "shall have the right to enter into valid legal contracts . . . ." Ill. Rev. Stat. ch. 40, ¶ 2205(a) (1983).[6] Thus, to protect minors from their own immaturity, our society holds parents legally responsible for the custody, care, and nurture of their minor children.

To aid parents in the challenging, difficult, and sometimes burdensome task of raising children and fulfilling the legal duty of providing for their well-being, our society grants parents the right, within bounds of reason, to direct the rearing of their children. In our free, democratic nation "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation

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[6] I note an apparent anomaly in the Illinois statutory scheme. Even though minor unemancipated children are legally incapable of entering into valid contracts in the State of Illinois, a minor unemancipated *pregnant* child is legally capable of consenting to the performance of a medical or surgical procedure. According to Ill. Rev. Stat. ch. 111, ¶ 4501 (1983):

> "The consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery executed by a . . . pregnant woman who is a minor . . . is not voidable because of such minority, and, for such purpose, . . . a pregnant woman who is a minor . . . is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age."

Thus, in the case of a minor unemancipated *pregnant* female child, the Illinois legislative scheme, not in conformity with any decisions of the United States Supreme Court, carves out an exception to the general rule that minor unemancipated children lack the knowledge, experience, and judgment to make mature, informed, well-reasoned decisions.

for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). *See also H.L. v. Matheson*, 450 U.S. 398, 410 (1981) ("*Matheson*"); *Bellotti II*, 443 U.S. at 638 (plurality opinion). The Supreme Court has even acknowledged "the existence of a *constitutional parental right* against undue, adverse interference by the State." *Bellotti II*, 443 U.S. at 639 n.18 (plurality opinion) (emphasis added). According to the Court, "*constitutional interpretation* has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic to the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (emphasis added). *See also Matheson*, 450 U.S. at 410; *Bellotti II*, 443 U.S. at 638 (plurality opinion). Thus, an integral component of the parents' legally mandated responsibility to provide for the supervision, health, maintenance, support, and well-being of their unemancipated minor children is the corresponding right of parents, as recognized in judicial interpretations of the Constitution, to direct the rearing of their children and to participate in the important decisions affecting their childrens' lives.

In the present case, there is no question that a minor, unemancipated, unmarried, immature, female child's decision whether or not to abort her pregnancy is an extremely important psychological, emotional, and physical choice. The Supreme Court has repeatedly recognized that "[t]he decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 67 (1976) ("*Danforth*"). *See also City of Akron v. Akron Center for Reprod. Health*, 103 S. Ct. 2481, 2499 (1983) ("*Akron*"). There are a multitude of serious factors for the minor unemancipated child to consider in making an informed, mature abortion decision. The child must understand that abortion is a surgical procedure, *see* J. Pritchard & P. McDonald, *Williams Obstetrics* 603 (16th ed. 1980), that has far-reaching effects upon a young, sensitive female. There are severe psychological and

emotional stresses involved not only before and during the abortion procedure, but for days, months, and even years following the procedure. It is well documented that mature women who undergo abortions often experience psychological disorders and mental health problems in the form of depressive psychosis. Impressionable, young females of tender years are even more susceptible to such mental disturbances when confronted with the emotional decision of whether or not to abort their pregnancy. For many individuals, including minor children, the abortion decision raises questions that are often influenced by sincere, deep-rooted religious beliefs, moral principles, and convictions. The dilemma and confusion that is instantly thrust upon a fragile, young female in her decision to bear a child may result in psychological, psychiatric, and moral scars that, all too frequently, never heal. Added to this mental strain and anguish is a consideration of the almost endless variety of physical risks involved in having an abortion. Depending upon the minor's physical characteristics and development, complications may very well arise during the abortion procedure that only an experienced, well-trained surgeon is capable of recognizing and effectively treating. Such complications include trauma, permanent damage to vital organs, dysfunction of the cardiovascular or respiratory system requiring cardiopulmonary resuscitation, internal bleeding or hemorrhaging of the uterine wall, cervical lacerations, uterine perforation, embolism of the blood vessels, allergic reaction to medication or anesthesia, if administered, and even the permanent impairment of reproductive organs.[7] Other medical factors that must be

[7] Due to the wide variety of medical complications that may, and often do, arise during an abortion procedure, the abortion facility must have basic, life-saving medical equipment and qualified personnel to operate such equipment, as well as immediate access to a hospital. Indeed, "[w]hen an abortion is not performed in a hospital setting, it is imperative that the capabilities for effective cardiopulmonary resuscitation be immediately available and that hospitalization can be promptly facilitated whenever needed." J. Pritchard & P. MacDonald, *Williams Obstetrics* 603 (16th ed. 1980).

considered in making a mature, informed abortion decision include the type of abortion to be performed (dilation and curettage, dilation and vacuum aspiration, hysterotomy, or hysterectomy), the minor child's past medical history, her physical reaction to previous surgical procedures, her tolerance for certain medications, the chance that she is an RH-negative female, the likelihood of contracting a uterine infection, the chance that the placenta and fetus will not be completely removed, the potential for future difficulties in bearing children, and even the possibility of sexual sterility. There are the economic considerations of who will fund the abortion procedure and post-treatment check-ups, are the physician's rates reasonable, and will insurance cover the abortion and any costly medical or psychiatric complications that may arise following the surgical abortion procedure. There are also the social and psychological concerns of whether or not to inform the potential father of the pregnancy, whether or not to confide in friends about the decision, the fear of a life-long stigma if peers learn of the abortion, the feeling of anger toward the potential father and all males in general, the onset of guilt and overall withdrawal from society, and the ever present and increasing threat of teenage suicide. In addition, just as in any surgical procedure, the minor child is entitled to an explanation of the reasonable alternatives to abortion, including adoption and extended-family care with the assistance of parents, grandparents, and siblings. In this age of four, five, and six million dollar medical malpractice jury verdicts, it is also important to review the competence, qualification, and skill of the surgeon performing the abortion procedure, whether the surgeon is Board certified, whether the surgeon is accurate in his pregnancy term diagnosis, the surgeon's experience in dealing with the variety of complications that may very well arise during the abortion procedure, the quality of the abortion facility, and the sterility of the surgical tools and instruments to be used in the abortion procedure.

It defies reason to expect a minor, unemancipated, unmarried, immature, female child to properly and ade-

quately consider each and every one of the important factors involved in the tumultuous abortion decision. The child should consult with the regular family physician who has treated her in the past and knows her unique physical characteristics, medication tolerances, and physical as well as psychological ability to undergo the stress involved in the abortion procedure. More importantly, the child needs the input, advice, and counsel of her parents, who are deeply concerned and interested in their daughter's welfare, have known her emotional and psychological make-up from birth, and can best identify and relate the psychological, moral, medical, social, economic, and practical factors to consider. The parents, who are legally responsible for their minor daughter's well-being before, during, and after the abortion, can review the competence, qualification, and training of the surgeon performing the abortion, provide the surgeon with relevant medical and psychological data concerning their daughter, seek additional medical consultation, if deemed necessary, and in the event a complication may arise, institute a lawsuit against the abortionist to recover for the injury or even the death of their daughter. In view of the minor child's clear need to consult with her parents in making a mature, informed, well-reasoned abortion decision:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

Danforth, 428 U.S. at 91 (Stevens, J., concurring) (footnote omitted). *See also Matheson*, 450 U.S. at 409-10; *Bellotti II*, 443 U.S. at 640-41 (plurality opinion). The

Supreme Court further reasons that:

> "The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature. An adequate medical and psychological case history is important to the physician. Parents can provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data."

Matheson, 450 U.S. at 411 (footnote omitted).

The Supreme Court, fully aware of the need to protect the minor unemancipated child from making an immature, uninformed decision of whether or not to abort her pregnancy, has approved of, and placed its imprimatur in no uncertain terms upon, state statutes requiring parental consultation in the abortion decision of a minor child. According to the Court, because:

> "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concern."

Bellotti II, 443 U.S. at 640 (plurality opinion) (footnotes omitted). *See also Matheson*, 450 U.S. at 409. Added to the minor child's need to consult with her parents to make a mature, informed abortion decision, is the parents' constitutional right to supervise, direct, and properly control the upbringing of their children. An essential component of the parents' right to direct the rearing of their children is the opportunity to participate in their daughter's important decisions, including the choice of whether or not to undergo an abortion procedure. Thus, to protect not

only the minor child from making an immature, uninformed abortion decision, but also to protect the parents' constitutional right to direct and guide the rearing of their children, for whom the parents are legally responsible, "States have a legitimate interest in encouraging parental involvement in their minor children's decision to have an abortion." *Akron*, 103 S. Ct. at 2491 n.10.

The Illinois General Assembly, in enacting the Illinois Parental Notice of Abortion Act, sought to protect minor unemancipated children from their own immaturity and to protect the constitutional right of parents to direct the upbringing of their children. The express legislative purpose of the Act is:

> "to further the important and compelling State interests of: 1) *protecting minors against their own immaturity*, 2) fostering the family structure and preserving it as a viable social unit, and 3) *protecting the rights of parents to rear children who are members of their household.*"

Ill. Rev. Stat. ch. 38, ¶81-62(a) (emphasis added). To effectuate the intended purpose of the Act, the Illinois legislature enacted section 4(a) which provides that when a minor unemancipated child decides to abort her pregnancy, the child's parents must be notified and afforded a twenty-four hour period in which to analyze and discuss the decision with their daughter. The Illinois legislature, following extensive debate and thoughtful consideration of the fact that minor unemancipated children are generally unable to formulate informed, mature, well-reasoned decisions—as evidenced by their legal incapacity to enter into valid contracts in the State of Illinois—passed the twenty-four hour waiting period. According to the legislature's findings of fact:

> "1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly

> when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion."

Ill. Rev. Stat. ch. 38, ¶81-62(b). The twenty-four hour waiting period affords minor unemancipated children and their parents at least a brief time to discuss and consider the numerous factors involved in reaching a mature, well-informed decision of whether or not to abort the pregnancy.

Within the twenty-four hour period, the parents have the opportunity to analyze the psychological and emotional stress that their young daughter is experiencing and may very well continue to experience for some time following the abortion procedure. The parents also have an opportunity to contact their daughter's regular family physician, inform him of the situation, and receive the medical advice necessary to aid the minor child in making a mature, informed decision. The parents, in fulfilling their legal responsibility and duty to provide for the child's well-being, may inquire into the competency of the surgeon performing the abortion to determine if he is a well-trained, qualified surgeon or simply a second-rate surgeon who entered the abortion practice because he was denied hospital staff privileges, by a medical peer review committee after questionable medical procedures or inferior surgical technique. Furthermore, the twenty-four hour period allows parents to discuss and explain the moral implications and deep religious concerns, if any, that are involved in the decision of whether or not to abort a pregnancy. The parents, likewise, may offer their young child valuable, experienced counsel and advice concerning the short- and long-term effects of bearing a child and of terminating a pregnancy. All too often minor female

children find themselves trapped on an "abortion treadmill," inundated with opinions from peers and boyfriends to proceed immediately with the "quick fix" abortion procedure. The parents can help the child reflect upon abortion alternatives, reviewing the positive and negative aspects of adoption and extended-family care involving parents, grandparents, and siblings. Similarly, the parents, who have raised their child from birth, are in a better position to reasonably and objectively examine the psychological, moral, medical, social, economic, and practical considerations that so often become confused and muddled within the mind of a young, fragile female about to terminate a pregnancy. In sum, the twenty-four hour waiting period allows parents, who presumably best understand their own child's natural strengths and weaknesses, to offer their daughter guidance, security, comfort, and experienced counsel. Additionally, the twenty-four hour waiting period allows parents, at least for a day-long period, to participate in the their daughter's abortion decision and thus exercise their constitutional right to supervise, direct, and properly control the rearing of their child, for whom the parents are legally responsible.

The majority rightfully acknowledges that the State "has a significant interest in promoting parental consultation with a minor before her decision to have an abortion." The majority speculates, however, that the twenty-four hour waiting period following parental notification imposes an undue burden upon the minor child because this day-long postponement may result in scheduling delays and conflicts at the abortion facility that will further complicate the child's decision to abort her pregnancy. According to the majority, a twenty-four hour delay could, hypothetically, result in a week-long delay depending upon the scheduling calendar of the doctor, the minor unemancipated child, and the abortion facility. So too, it is conceivable that a power outage, an automobile breakdown, or an illness to the physician could result in a week-long delay. Based upon sheer conjecture, the majority mistakenly concludes that the speculative scheduling conflicts that may be imposed upon a minor child by the

twenty-four hour waiting period outweigh the child's need to make a mature, informed, well-reasoned abortion decision as well as the parents' constitutional right to participate in that decision. In support of this legally, morally, and socially unsound position, the majority relies upon this court's holding in *Pearson* that "the state cannot require that an abortion be delayed once notification has been effected upon a minor's parents." 716 F.2d at 1143. In addition, the majority blindly adheres to the language in *Pearson* that "[n]otification itself in most cases should lead to parental consultation without the state's additional help because minors are particularly susceptible to parental wishes . . . ." *Id.* Thus, according to the *Pearson* line of reasoning as adopted by the majority, the physician may fulfill his legal obligation by simply notifying the parents of their daughter's decision to abort her pregnancy and then, without disclosing the child's whereabouts, proceed immediately with the abortion procedure, never allowing the parents to participate in their daughter's abortion decision. What the majority fails to comprehend is that the *Pearson* decision is premised upon skewed logic, a flawed legal analysis, and a complete disregard for the parental rights involved.

In *Pearson*, the Indiana statute, similar to the Illinois Act in the present case, provided that parents must be notified of their minor unemancipated daughter's decision to have an abortion and, following this notification, the child must wait twenty-four hours before undergoing the abortion procedure. This court held the twenty-four hour waiting period unconstitutional because "the same objections to waiting periods for adults listed in *City of Akron* apply to waiting periods for minors." *Pearson*, 716 F.2d at 1143. The court's reasoning in *Pearson*, as well as the reasoning of the majority in the present case, contravenes logic, reason, and common sense as it leaps blindly from *Akron*, a case involving the abortion decision of mature adult women, to the completely separate and unrelated issue presented in this case; the need to protect minor, unemancipated, unmarried, immature, female children

who lack the knowledge, experience, and judgment necessary to make a mature, informed, well-reasoned abortion decision. In *Akron*, the Supreme Court enumerated the objections to a waiting period as 1) the increased cost of making two separate trips to the abortion facility, and 2) the potential for scheduling conflicts and delays that could possibly prolong the surgical abortion procedure. The glaring distinguishing factor of *Akron*, however, is that the statute in that case applied to mature women of majority age and thus the State's only expressed interest in the twenty-four hour waiting requirement was to ensure that the "woman's decision be informed." 103 S. Ct. at 2503. According to the Court in *Akron*, the State's concern that mature adult women make informed abortion decisions did not outweigh the potential burden of delay that may be imposed upon those women by the twenty-four hour waiting period. Thus, the Court ruled that if a mature adult woman "is prepared to give her written informed consent and proceed with the abortion, a State may not demand that she delay the effectuation of that decision." *Id.*

In stark contrast, the twenty-four hour waiting period of the Illinois Act, just as the Indiana statute in *Pearson*, does not apply to mature adult women but exclusively to incompetents and minor, unemancipated, unmarried, immature, female children, legally dependent upon their parents. Unlike the State's interest in *Akron*—to ensure that all women, including mature adults, make an informed abortion decision—the State of Illinois' interest is to protect minor unemancipated female children from their own immaturity, as well as to protect parents' constitutional right to direct the upbringing of their minor children, for whom the parents are legally responsible. The obvious analytical difference between *Akron* and the present case is that adult women are presumed capable of making an informed, mature, well-reasoned choice while minor, unemancipated, immature, unmarried children lack the knowledge, experience, and judgment necessary to make an informed, mature abortion decision. The majority, just as the court in *Pearson*, fails to make

this critical distinction between the twenty-four hour waiting period for mature adult women, held unconstitutional in *Akron*, and the twenty-four hour waiting period exclusively for minor unemancipated female children, as set forth in the Illinois Act. Indeed, aside from *Pearson*, every case cited by the majority holding waiting periods unconstitutional involves a statute that imposes a waiting period upon mature adult women, similar to the one in *Akron*. *See Akron*, 103 S. Ct. at 2489 (twenty-four hour waiting period applies to all women); *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 305 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3726 (April 16, 1985) (twenty-four hour waiting period applies to all women); *Women's Services, P.C. v. Thone*, 690 F.2d 667, 668 (8th Cir. 1982), *vacated sub nom. Kerrey v. Women's Services, P.C.*, 103 S. Ct. 3201 (1983) (forty-eight hour waiting period applies to all women, *see Women's Services, P.C. v. Thone*, 483 F. Supp. 1022, 1050 n.25 (D. Neb. 1979)); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1013 (1st Cir. 1981) (twenty-four hour waiting period applies to all women); *Charles v. Carey*, 627 F.2d 772, 780 n.11 (7th Cir. 1980) (twenty-four hour waiting period applies to all women); *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1145 (D.R.I. 1982) (twenty-four hour waiting period applies to all women); *Leigh v. Olson*, 497 F. Supp. 1340, 1347-48 (D.N.D. 1980) (forty-eight hour waiting period applies to all women); *Margaret S. v. Edwards*, 488 F. Supp. 181, 212 (E.D. La. 1980) (twenty-four hour waiting period applies to all women); *Women's Community Health Cntr., Inc. v. Cohen*, 477 F. Supp. 542, 548 (D. Me. 1979) (forty-eight hour waiting period applies to all women).[8] The majority,

[8] The majority cites *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) for the proposition that a waiting period imposed upon a minor unemancipated child is unconstitutional. In that case, however, this court held the forty-eight hour waiting period for minor unemancipated children unconstitutional because it vio-

(Footnote continued on following page)

in effect, fails to separate the wheat from the chaff. The Illinois Act does not impose a waiting period upon mature adult women, it simply requires that once the minor unemancipated child's parents have been notified of the abortion decision, the child must wait twenty-four hours before undergoing the surgical abortion procedure. The purpose of the twenty-four hour waiting period is to afford parents an opportunity to supervise and direct the raising of their minor daughter and offer valuable advice, guidance, protection, support, and counseling to aid the immature child in making a mature, informed, well-reasoned decision of whether or not to abort her pregnancy.

In *Pearson*, the court asserted, as does the majority in the present case, that "[n]otification itself in most cases should lead to parental consultation without the state's additional help because minors are particularly susceptible to parental wishes . . . ." 716 F.2d at 1143. I initially note that this statement, aside from equivocating with the speculative term "should," misses the very point of a waiting period for minor, unemancipated, unmarried, immature, female children; namely, that children must be protected from making an immature, uninformed abortion decision and that parents have a constitutional right to direct the upbringing of their children. The State is required to protect the interests of parents and their children, not blithely leave it to chance that a particular minor child will be "susceptible to parental wishes." I further note that parental notification itself, without a waiting period, neither allows nor assures parents an

[8] *continued*

lated the Equal Protection Clause of the Fourteenth Amendment by excluding married minors and including mature, emancipated minors. The court never addressed the issue presented in this case—whether the forty-eight hour waiting period unduly burdens the minor's decision to abort her pregnancy—and thus the legal analysis in *Wynn v. Carey* fails to support the majority's position.

opportunity to analyze and discuss with their minor daughter the multitude of factors necessary to consider when deciding whether or not to abort a pregnancy. According to the terms of the notification statute, the surgeon need only notify the parents of their daughter's decision to abort her pregnancy and, having fulfilled this legal obligation, the surgeon can proceed immediately with the abortion, never allowing the parents an opportunity to participate in the decision. Such a result is legally, morally, and socially insupportable when one considers that the parents are not only legally responsible for the well-being and financial obligations of their minor daughter before, during, and after the abortion, but have a constitutional right to supervise, direct, and control their daughter's upbringing.

I am convinced that the only feasible way for a State to protect minor unemancipated children from their own immaturity and lack of experienced judgments in the affairs of life, as well as to protect the constitutional right of parents to direct the rearing of their children, short of a parental consent statute, is to require a minimal waiting period following parental notification.[9] The Illinois legislature has a compelling interest in safeguarding minor, unemancipated, unmarried, immature, female children from making an immature, uninformed abortion decision. Moreover, the Illinois legislature has a compelling interest in protecting the constitutional right of parents to direct

[9] The Supreme Court has repeatedly held that a "State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial." *Ashcroft*, 103 S. Ct. at 2525. *See also Akron*, 103 S. Ct. at 2497; *Bellotti II*, 443 U.S. at 640 (plurality opinion). Thus, parental consent statutes are constitutionally permissible if drafted in compliance with the Supreme Court's legal standards. In the present case, a statute requiring parental consent of a minor unemancipated female child's decision to have an abortion would apparently conflict with Ill. Rev. Stat. ch. 111, ¶ 4501, which permits a minor unemancipated *pregnant* child to consent to a medical or surgical procedure. *See supra* note 6.

the upbringing of their minor unemancipated child, especially when one considers that the State of Illinois holds these parents legally responsible for their daughter's well-being before, during, and after the abortion, until the child reaches the majority age of eighteen. The State's interest in protecting minor children and their parents' constitutional right clearly outweighs any potential burden of delay placed upon the minor unemancipated female child by the twenty-four hour waiting period. Indeed, the Supreme Court, realizing the inability of minor children to make an informed, mature, well-reasoned abortion decision, has consistently upheld the constitutionality of parental consent statutes. *See Ashcroft*, 103 S. Ct. at 2525; *Akron*, 103 S. Ct. at 2497; *Bellotti II*, 443 U.S. at 640 (plurality opinion). These parental consent statutes, as upheld by the Supreme Court, create a potential for extended delay because the minor child is required to obtain actual parental consent before undergoing the abortion procedure. In contrast, the twenty-four hour waiting period simply requires the child to wait twenty-four hours from the time of parental notification before aborting her pregnancy.

The twenty-four hour waiting period of the Illinois Act appears, at best, to be a product of political compromise. It is clear that parental consent statutes are constitutionally permissible if drafted in compliance with the Supreme Court's legal standards. The parental consent statute is certainly the most effective means of ensuring that minor unemancipated children make a mature, informed, well-reasoned abortion decision and that parents have an opportunity to participate in that decision. The Illinois statutory scheme provides, however, that minor unemancipated *pregnant* children are legally capable of consenting to a medical or surgical procedure. *See* Ill. Rev. Stat. ch. 111, ¶ 4501.[10] Thus, in Illinois a minor unemancipated *pregnant* child, who is legally incapable of entering into a valid contract, may consent to an abortion.

[10] See *supra* note 6.

Given this inconsistent provision of Illinois law, allowing minor, unemancipated, immature, unmarried, female children to consent to an abortion, the waiting period is the next most effective means of ensuring that parents assist their child in making a mature, informed, well-reasoned abortion decision.[11] Thus, I believe the twenty-four hour waiting period of section 4(a) properly protects minor unemancipated children and their parents' constitutional right without unnecessarily and excessively delaying or infringing upon the minor, unemancipated, unmarried, immature, female child's decision to abort her pregnancy.

I add that section 7(a) of the Act also protects minor unemancipated children from their own immaturity and the constitutional right of parents to direct the rearing of their children, for whom the parents are legally responsible. Section 7(a) provides that no parental notification need be given if parents accompany the child to the abortion facility or if the child presents the surgeon a notarized statement, signed by her parents, acknowledging her abortion decision. In either situation, the minor child has obviously informed her parents of the abortion decision and the parents have had an opportunity to discuss the decision with their daughter. Thus, it is reasonable to assume that the child has received the mature advice, input, and counsel of her parents or legal guardian and that the parents have exercised their constitutional right to direct the rearing of their minor child. Accordingly, I would uphold section 4(a) and section 7(a) of the Act as promoting the State of Illinois' compelling interest in protecting minor unemancipated children

[11] A parental consent statute ensures parents an opportunity to participate in the abortion decision of their minor child, for whom the parents are legally responsible. In the absence of a parental consent statute or a notification and waiting period statute, I believe the State has a duty to protect parents from being held legally responsible for the medical costs arising out of their daughter's abortion because such parents have had no opportunity to participate in the abortion decision.

from making an uninformed, immature abortion decision and in protecting the right of parents, as recognized in judicial interpretations of the Constitution, to participate in the abortion decision of their minor unemancipated daughter. In addition, I believe that we must consider setting aside this court's erroneous ruling in *Pearson*, which failed to distinguish between the waiting period requirement for mature adult women held unconstitutional in *Akron* and the waiting period requirement for minor, unemancipated, unmarried, immature, female children presented in this case. It is evident that the State of Illinois has a compelling interest in passing well-reasoned, compromised legislation that protects minor unemancipated children from their own immaturity and also protects parents' constitutional right to direct the rearing of their children, for whom the parents are legally responsible.

B. JUDICIAL ALTERNATIVE TO PARENTAL NOTIFICATION

The Supreme Court has approved state statutes requiring parental consent to a minor unemancipated female child's decision to abort her pregnancy. *See Ashcroft*, 103 S. Ct. at 2525; *Akron*, 103 S. Ct. at 2497; *Bellotti II*, 443 U.S. at 640 (plurality opinion). The Supreme Court requires, however, that "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Bellotti II*, 443 U.S. at 643 (plurality opinion) (footnote omitted). Indeed, "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Akron*, 103 S. Ct. at 2498. *See also Ashcroft*, 103 S. Ct. at 2525. In the present case, the Illinois Act merely requires parental notification, not parental consent, of the minor unemancipated child's decision to terminate her pregnancy. Nevertheless, the Supreme Court has indicated that an alternative procedure must also be provided when parental notification is involved. *See Bellotti II*, 443 U.S. at 651 (plurality opinion). According to the Supreme Court, the alternative procedure is necessary because the "state and parental interests must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement." *Akron*, 103 S. Ct. at 2491 n.10.

In *Bellotti II* the Supreme Court established that the alternative procedure to parental notification "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." 443 U.S. at 644 (plurality opinion). *See also Ashcroft*, 103 S. Ct. at 2525 n.16. In the present case, section 5 of the Act provides minor unemancipated children with a judicial alternative to parental notification. The minor may appear in an Illinois state court on her own behalf, with counsel of her choice, or with court-appointed counsel, and request that the court waive the parental notification requirement of section 4(a). The minor is not required to pay the statutory filing fee and, pursuant to section 5(c) of the Act, the entire court proceeding "shall be confidential." The Act further provides for an expedited judicial procedure, requiring the Illinois state court to rule, within forty-eight hours of the child's application, on whether the minor unemancipated child is "mature and well-informed enough to make the abortion decision on her own, or ... that notice ... would not be in the best interests of the minor ...." Ill. Rev. Stat. ch. 38, ¶ 81-65(d). Moreover, the court must issue written findings of fact and conclusions of law to support its decision. Ill. Rev. Stat. ch. 38, ¶ 81-65(e). Pursuant to section 5(f) of the Act, if the Illinois state court denies the minor child's application for waiver of parental notification, the child is entitled, as a matter of right, to an expedited confidential appeal within the Illinois state court system. Because the Illinois Constitution, art. VI, § 16, mandates that the Illinois

Supreme Court is to enact rules of appellate procedure, section 5(g) of the Act requests the Illinois Supreme Court "to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner." Ill. Rev. Stat. ch. 38, ¶ 81-65(g). The plaintiff class complains that the judicial alternative to parental notification contained in section 5 fails to satisfy the constitutional requirements of anonymity and expeditious appellate review required by *Bellotti II*.

The plaintiff class initially argues that use of the word "confidential" in section 5 of the Act does not satisfy the constitutional requirement of *Bellotti II* that the alternative procedure ensure the unemancipated minor's anonymity. I agree with the majority that the plaintiffs' hypertechnical, attempted semantic distinction between the words "confidential" and "anonymity" lacks merit. The purpose of the anonymity requirement is to safeguard the unemancipated minor child's privacy in her attempt to waive the parental notification requirement. The term "confidential" is more than adequate to ensure the child's privacy. Indeed, the Supreme Court, when discussing the anonymity requirement, uses the terms "confidentiality" and "anonymity" interchangeably. *See Ashcroft*, 103 S. Ct. at 2525 n.16. *See also Bellotti II*, 443 U.S. at 645 (plurality opinion) ("preserve *confidentiality* as to the minor"). Thus, the Illinois legislature's use of the term "confidential" clearly satisfies the anonymity requirement set forth in *Bellotti II*. I further note that on June 30, 1984, the Illinois legislature amended section 5(c) of the Act to provide, in pertinent part, that "Court proceedings under this section shall be confidential and shall *ensure the anonymity of the minor or incompetent.*" *See* 1984 Ill. Leg. Serv. 270 (West) (emphasis original). In view of this recent amendment, there is no question that section 5 of the Act ensures anonymity of the minor unemancipated child throughout the judicial waiver proceedings.

Despite the constitutionality of the anonymity requirement of section 5, the majority enjoins enforcement of the Act until the Illinois Supreme Court promulgates rules of confidentiality. According to the majority, "the Illinois statute does not make any specific provisions to assure the minor's anonymity at the waiver hearing." The majority's speculative concern apparently lies in the fact that the Illinois statute, unlike the Missouri statute upheld by the Supreme Court in *Ashcroft*, does not direct that the initials of the minor unemancipated child be used on the waiver petition filed in state court. The majority's reasoning disregards the Supreme Court's proviso in *Ashcroft* that the state legislature need only "provide[ ] the *framework* for a constitutionally sufficient means" of ensuring the anonymity of the minor child throughout the judicial waiver proceeding. 103 S. Ct. at 2525 n.16 (emphasis added). The Illinois legislature has indeed provided this framework in sections 5(c) and 5(f) of the Act, requiring that the initial proceedings and any appeals be "confidential." Because the district court enjoined enforcement of the Act some five days before its effective date, the Illinois Supreme Court has had no need to promulgate rules concerning confidentiality. There is no reason to believe, however, that the state court judges of Illinois will not comply with the mandate of prior United States Supreme Court opinions and ensure the anonymity of the minor unemancipated female child throughout the judicial waiver proceedings. The Illinois state court judges are, in my opinion, as equally competent and dedicated as are the members of this court in properly intepretting and adhering to the existing Supreme Court case law. Indeed, if the Illinois state court judges fail to provide for the anonymity of the minor unemancipated child, they will be in direct violation of the law. The majority's speculative assertion that Illinois state courts will not adequately provide for the anonymity of minor unemancipated children is sheer conjecture, without any basis in reason or experience. Thus, I disagree with the majority's reasoning and would hold that section 5 does, in fact, provide the framework necessary to ensure the anonymity of the minor unemancipated child throughout the judicial waiver proceedings.

The plaintiff class also contends that the appeal process, as adopted by the Illinois legislature in section 5 of the Act, fails to satisfy the constitutional requirement of *Bellotti II* that the alternative to parental notification be completed with expediency. Section [illegible] Act provides that "[a]n expedited confidential appeal shall be available, as the Supreme Court provides by rule . . . ." Ill. Rev. Stat. ch. 38, ¶ 81-65(f). According to the Illinois Constitution, art. VI, § 16, the Illinois Supreme Court is to enact rules of appellate procedure, thus the Illinois legislature directs, in plain and simple language, that the Illinois Supreme Court "promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious . . . manner." Ill. Rev. Stat. ch. 38, ¶ 81-65(g). In *Ashcroft*, the Supreme Court considered an almost identical statute that provided:

> "The notice of intent to appeal shall be given within twenty-four hours from the date of issuance of the order. The record on appeal shall be completed and the appeal shall be perfected within five days from the filing of notice to appeal. *Because time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.*"

103 S. Ct. at 2525 n.16 (emphasis added). The Court in *Ashcroft* upheld the Missouri statute because it "provides the framework for a constitutionally sufficient means of expediting judicial proceedings." *Id.* The Court further noted that immediately after its effective date, the Missouri statute was enjoined and thus "there has been no need for the state supreme court to promulgate rules concerning appellate review." *Id.* Similarly, in the present case the Illinois legislature has provided the framework necessary for expediting the appeal of a judicial decision denying a minor child's application to waive parental notification. Because the district court enjoined the Act before it ever became effective, the Illinois Supreme Court has had absolutely no need to promulgate

rules of appellate review. I agree with the common sense approach of the Supreme Court in *Ashcroft* that "[t]here is no reason to believe that [Illinois] will not expedite any appeal consistent with the mandate" of prior Supreme Court opinions. *Id.*

The majority's attempt to distinguish section 5 of the Illinois Act from the Missouri statute held constitutional in *Ashcroft* is, at best, unpersuasive. It is true that the Illinois Act does not provide rules for the filing or perfection of appeals as did the Missouri statute in *Ashcroft*. Nevertheless, the Illinois Act provides the framework necessary to satisfy the constitutional requirement of an expedited appellate review. I have every reason to believe that the well-trained judges within the Illinois state court system will follow the controlling statutes and case law, expediting appeals consistent with the Supreme Court's decisions. Thus, unlike the majority, I would hold that section 5 of the Act provides the framework necessary to provide minor unemancipated children with expedited appeals of judicial determinations denying waiver of parental notification.

I add that the majority's concern over the lack of any Illinois Supreme Court rules to ensure anonymity and expediency in the judicial waiver proceedings is premised, in large measure, upon the Third Circuit's opinion in *American College of Obstetricians v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3726 (April 16, 1985). In that case, the Pennsylvania Abortion Control Act of 1982 provided for an expedited and confidential judicial waiver proceeding but required the Pennsylvania Supreme Court to promulgate rules to "ensure confidentiality and . . . promptness of disposition." 737 F.2d at 307-08. Despite the clear framework for a confidential and expedited judicial proceeding, the Third Circuit enjoined enforcement of the Act until the Pennsylvania Supreme Court promulgated such rules "assuring confidentiality and promptness of disposition . . . ." *Id.* at 297. I note that on April 15, 1985, the Supreme Court granted certiorari to review the Third Circuit's opinion. *See* 53

U.S.L.W. 3726 (April 16, 1985). One of the issues before the Supreme Court is whether the "court of appeals misappl[ied] precedents of [the] Supreme Court in declaring unconstitutional numerous provisions of Pennsylvania's Abortion Control Act." *Id.* at 3727. I believe that the Third Circuit's decision to enjoin enforcement of the Pennsylvania Abortion Control Act until the Pennsylvania Supreme Court promulgates rules of anonymity and expeditious appellate review is in direct conflict with the Supreme Court's directive in *Ashcroft* that the state legislature need only provide the *framework* necessary to ensure anonymity and expediency throughout the judicial waiver proceedings.

III

In summary, the twenty-four hour waiting period of section 4(a) is constitutional because it protects minor, unemancipated, unmarried, immature, female children who are legally dependent upon their parents from making an immature, uninformed abortion decision. Moreover, the twenty-four hour waiting period protects parents' constitutional right to direct the upbringing of their minor children. Under Illinois law, parents are legally responsible for the health, maintenance, support, and well-being of their minor children and also for the decisions made by their minor children, including the decision to undergo a surgical abortion procedure. As a corresponding liberty to these legal responsibilities, parents have the right, as recognized in judicial interpretations of the Constitution, to participate in their minor unemancipated daughter's abortion decision. Section 5 of the Act is also constitutional because it provides the framework necessary to 1) ensure the anonymity of the minor unemancipated child throughout the judicial waiver proceeding, and 2) expedite the appeal of a judicial determination to deny the minor child's application to waive parental notification. Thus, unlike the majority, I would not defeat the sincere efforts of the competent Illinois legislature to protect minor unemancipated children from

their own immaturity and to protect the constitutional right of parents to direct the rearing of their children. I would not sever section 4(a) from the Act nor enjoin enforcement of the Act until the Illinois Supreme Court promulgates rules of confidentiality and expedited appellate review. Instead, I would reverse the district court, vacate the permanent injunction, and allow the State of Illinois to implement the will of its citizenry, as expressed by the Illinois legislature in the Parental Notice of Abortion Act of 1983.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 771

DAVID ZBARAZ, M.D., et al.,

Plaintiffs,

v.

NEIL HARTIGAN, et al.,

Defendants.

MEMORANDUM OPINION

On November 2, 1983, the Illinois General Assembly passed, over the veto of Governor Thompson, the Parental Notice Abortion Act, P.A. 83-890 (Senate Bill or "SB 521") which plaintiffs here challenge as unconstitutional on a number of grounds. SB 521 regulates the performance of abortions on unemancipated minors and incompetents. Section 8 of the Act provides that anyone who "intentionally, knowingly, or recklessly fails to conform" to any of the Act's requirements is guilty of a Class A misdemeanor.

Shortly before the Act was to take effect on January 31, 1984, plaintiffs filed a class action suit requesting a preliminary injunction or, alternatively, a temporary restraining order. On January 30, 1984, the parties agreed to extend a temporary restraining order, entered January 26, 1984, pending resolution of the issues presented in this case. On February 17, 1984, we certified a plaintiff class

consisting of Drs. Allen G. Charles and David Zbaraz, as representatives of all duly licensed physicians presently performing or desiring to perform pregnancy terminations for unemancipated minors and disabled persons in the State of Illinois, on their own behalves, and on behalf of certain of their patients desiring abortions.[1] The defendant class consists of Richard M. Daley, in his official capacity as State's Attorney for Cook County, Illinois, and as representative of all the State's Attorneys of all of the counties of Illinois.[2]

Before us are the parties' simultaneous cross-motions for summary judgment. After a careful consideration of SB 521 in the light of recent Supreme Court decisions, as well as those of the Seventh Circuit, we find, as did Governor Thompson, that SB 521 is constitutionally defective. Therefore, plaintiffs' motion for summary judgment is granted and we will permanently enjoin defendants from enforcing its provision.

I. Parental Notice Abortion Act of 1983[3]

Section 2 of the Act delineates the legislative intent in enacting the parental notice provisions—to further the compelling state interests of "1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their households." The legislative found as fact

> that 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who

> are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

Section 2(b)(1)-(5).

Section 4(a) of the Act provides that "[n]o person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice [in person or by telephone] to both parents or to the legal guardian . . . ." However, a minor or incompetent who objects to notice "may petition, on her own behalf or by next friend, the circuit court of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement . . . ." Section 4(c).

Section 5 delineates the procedure for waiver of notice. A minor or incompetent may participate on her own behalf in the proceedings. The court shall appoint a guardian *ad litem* for her and advise her that she has a right to court appointed counsel, available upon her request. Court proceedings "shall be confidential" and "shall be given precedence" to ensure a prompt decision. The circuit court is also required to rule within 48 hours of the application. The court shall waive the notice requirement if it finds that the applicant is mature and well-informed enough to make the abortion decision on her own or if notification would not be in the applicant's best interests. Section 5(e) provides that a confidential record of the evidence be maintained. Further, if a circuit court denies waiver of notice, "[a]n expedited confidential appeal shall be available as the Supreme Court provides by rule . . . ." Section 5(f). Section 5(g) states that "[t]he Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings . . . are handled in an expeditious and confidential manner."

There are several exceptions to the 24 hour notice requirement available to the applicant: (1) medical emergency as determined by the physician (section 6); (2) when notice has been given and the parties (the parents to whom notice is due under section 4) accompany the minor or incompetent to the place of the abortion or submit signed notarized statements indicating that they have been properly notified (section 7(a)); and (3) notice to a minor's father is not necessary if the mother accompanies her and submits a notarized statement of notification and states orally to the physician that she has a reasonable belief that the father of the unborn child is the minor's father.

Section 8 of the Act provides that anyone who fails to conform to any of the Act's requirements is guilty of a Class A misdemeanor. Further, failure to provide persons to whom notice is due with the requisite information "is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions" for which exemplary damages are not precluded by the statute.

On September 26, 1983, Governor Thompson vetoed SB 521. He found "many constitutional deficiencies", including the "waiver of notice" provisions which, he stated, could not pass constitutional muster under *City of Akron v. Akron Center for Reproductive Health, Inc.*, 103 S. Ct. 2481, 2991 n. 10 (1983) ("*Akron*") and *Bellotti v. Baird*, 443 U.S. 622, 644 (1979) ("*Bellotti II*"). The Governor's veto was overridden on November 2, 1983.[4]

II. *Roe v. Wade* and its Progeny: *Children and Abortion*

A decade[5] after the Supreme Court held that the right of privacy, grounded in the concept of personal liberty, guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), the Court reaffirmed that decision in *Akron*, 103 S. Ct. 2481, 2487 & n.1 (1983) ("Since *Roe* was decided in February, 1973, the Court repeatedly and consistently has accepted and applied the

basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy") (citations omitted). However, a "woman's" fundamental right is not absolute, as the Court recognized in *Roe*, and the right becomes somewhat diluted as the particular "woman" is identified as a minor child or, per the Illinois Act, an "incompetent" or unemancipated minor. *See, e.g., H.L. v. Matheson*, 450 U.S. 398 (1981); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

Although a child, merely on account of her minority, is not beyond the protection of the Constitution, *see, e.g., Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969) (first amendment rights are available to students in a public school), the status of minors under the law is unique in many respects. *Bellotti II*, 443 U.S. at 633.

The Supreme Court has recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children, their inability to make critical decisions in an informed, mature manner, and the importance of the parental role in child rearing. *Id.* at 634. These reasons become especially salient in the context of a minor's decision to undergo an abortion. Moreover, a majority of the Court has indicated that it believes that pregnant adolescents are likely to reach poorly reasoned decisions concerning abortion.[6] *See, e.g., Bellotti II, supra*, 443 U.S. at 640; *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 91 (1976).

State regulations restricting a woman's right to choose abortion must be supported by a compelling state interest. *Akron, supra*, 103 S. Ct. at 2491. The Court has emphasized, however, that because of the unique status of children under the law, "[s]tates have a 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult' ". *Id.* at n.10, citing *Danforth, supra*, 428 U.S. at 75. To protect immature minors and to promote family integrity, a State may ensure that the abortion decision is made with

understanding and after careful deliberation. *Akron, supra*, 103 S. Ct. at 2500 n.32, citing *H.L. v. Matheson*, 450 U.S. 398 (1981). However, any State restriction of the right to choose abortion must be "subject to searching judicial examination." *Akron, supra*, 103 S. Ct. at 2491.

With these considerations in mind, we will assess the constitutionality of SB 521.

III.

Plaintiffs challenge SB 521 on a number of grounds, including its allegedly unconstitutional 24 hour waiting period, its allegedly inadequate judicial alternative to parental notification, and its assertedly overbroad application to incompetents.

Abstention

Defendants argue, for the first time in their reply brief, that because Illinois courts have never had a chance to construe the procedural aspects of SB 521 and to apply them in a constitutional manner, we should abstain from deciding the constitutional issue presented in this case. Under the circumstances, we may not do so.

In *Bellotti v. Baird*, 428 U.S. 132, 146-147 (1976) ("*Bellotti I*"), the Supreme Court indicated that "abstention is appropriate where an unconstrued statute is susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication . . . .' " (citations omitted) The Court noted that, while the equitable practice of abstention is limited by considerations of delay and expense which application of the doctrine inevitably engenders, the Supreme Judicial Court of Massachusetts had adopted a Rule of Court under which an issue of interpretation of Massachusetts law could be certified directly to that court for prompt resolution. *Id.* at 150. The Court admitted that the availability of certification greatly simplified the abstention analysis, especially in the context of resolution

of abortion issues where the importance of speed is "manifest". *Id.* at 151. Unlike Massachusetts, the Illinois certification procedures, as provided by Illinois Supreme Court Rule 20, are available only to the Supreme Court of the United States or to the Seventh Circuit Court of Appeals. *Cf. Wynn v. Scott*, 449 F. Supp. 1302, 1313-1314 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) (since abstention is an equitable doctrine, courts should consider whether its consequences are equitable; the absence of a state certification procedure, while not dispositive, points to the long delay which would follow abstention and prolong the uncertainty that women and their physicians would have to endure). *See also Wynn v. Carey*, 582 F.2d 1375, 1380-83 (7th Cir. 1978).

Recently, in *Akron*, *supra*, 103 S. Ct. at 2498-2499, and in *Ashcroft*, *supra*, 103 S. Ct. at 2526 n. 21, the Supreme Court declined to abstain from considering challenges to statutory provisions regarding notification and parental consent. Similarly, in *Pearson*, *supra*, 716 F.2d at 1133, the Seventh Circuit was urged to abstain until the Indiana courts had an opportunity to construe the procedural aspects of the notification statute. The court rejected that suggestion. In addition to its concern with respect to inadequate bypass procedures, the court was also troubled, as are we, "that a substantial period of time will elapse before a state record of interpretations of the statute will be developed, deterring in the meantime many minors from seeking waiver of parental notification." *Id.*

Because Illinois lacks a procedure whereby a federal district court may certify state law questions to the Illinois Supreme Court for relatively quick determination, *see Wynn*, *supra*, 449 F. Supp. at 1314, citing *Bellotti I*, and because of the urgency inherent in any constitutional determination of the abortion rights of young women, we do not believe that abstention is appropriate here.

24 Hour Waiting Period

Plaintiffs first contend that the 24 hour waiting period required by section 4(a) is unconstitutional, based on the recent Seventh Circuit decision in *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. Aug. 1983) ("*Pearson*"). In *Pearson*, the court considered the constitutionality of several sections of an Indiana statute requiring that a physician not perform an abortion upon an unemancipated minor without first notifying her parents. Specifically, the plaintiffs had challenged the constitutional sufficiency of the statutory provisions regarding waiver of the notice requirement. In concluding that these provisions were constitutionally inadequate, the Seventh Circuit based its analysis expressly on the two Supreme Court cases decided last year, *Akron* and *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 103 S. Ct. 2517 (1983) ("*Ashcroft*").

Plaintiffs point out that the notice provisions in the statute struck down in *Pearson* (Ind. Code §35-1-585-2.5(a)) are virtually indistinguishable from the notice provisions of SB 521. Section 2.5(a) provides:

> Sec. 2.5. (a) No physician shall perform an abortion upon an unemancipated pregnant woman under the age of eighteen (18) years without first having given at least twenty-four (24) hours actual notice to one (1) of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least forty-eight (48) hours constructive notice to one (1) of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one (1) of the parents or guardian computed from the time of mailing.

In *Pearson*, Judge Pell held that "the state cannot require that an abortion be delayed *once notice has been*

effected upon a minor's parents." *Pearson*, *supra*, 716 F.2d at 1143 (emphasis added). The statute before us requires a waiting period of at least twenty-four hours after notice has been given to the minor's parents, precisely the same waiting period as in *Pearson*.

While the Supreme Court has not "directly addressed the constitutionality of waiting periods imposed in connection with parental notification or consent statutes," *Pearson*, *supra*, 716 F.2d at 1142, it has found a 24 hour waiting period unconstitutional as applied to adult women seeking abortions. *Akron*, *supra*, 103 S. Ct. at 2503. Such a waiting period impermissibly burdens a woman's abortion choice by causing delay. The delay increases the cost and attendant scheduling problems of an abortion by requiring a woman to make two trips to the abortion clinic and often results in a delay of more than 24 hours. Both the Seventh Circuit and the Supreme Court have voiced concern over the "two-trip" problem and we share this concern. The possible necessity of "two-trips" would affect minors and incompetents to the same degree that it affects an adult woman.[7]

In *Akron*, the Court held that no legitimate state interest was shown to be furthered by "an arbitrary and inflexible waiting period." *Akron*, *supra*, 103 S. Ct. at 2503. This holding was based on the Court's conviction that the State's legitimate concern, that a woman's decision be informed, was not reasonably served by a 24 hour delay. *Id.* While the considerations with respect to minors are not identical with those applicable to adults, in the light of *Akron* and *Pearson*, we conclude that the waiting period of at least 24 hours mandated by SB 521 is invalid.

Alternative Procedure to Notification

Plaintiffs' second argument for the unconstitutionality of SB 521 relates to the alternative procedure to notification. Relying on *Pearson*, *Akron*, and *Ashcroft*, they claim that the judicial alternative to parental notice is inadequate because (1) SB 521 provides no assurance of an

expedited appeal; (2) there is no assurance of anonymity at the trial or appellate court level; and (3) the procedures for obtaining judicial waiver of notice are unconstitutional because they fail to provide for assistance in initiating a petition.

The State's interest in protecting immature minors will sustain a requirement of a consent or notice substitute, either parental or judicial. *Cf. Akron*, *supra*, 103 S. Ct. at 2497. But the State must assure that an adequate alternative procedure is available to create an "opportunity for case-by-case evaluations of the maturity of pregnant minors." *Akron*, *supra*, 103 S. Ct. at 2499, quoting *Bellotti II*, 443 U.S. at 643 n.23. Further, the alternative procedure must assure that a resolution of the issue, and any appeals therefrom, will be completed with anonymity and sufficient expedition to provide for an effective opportunity for an abortion to be obtained. *Bellotti II*, *supra*, 443 U.S. at 644. While the Court's view of alternative procedures has been considered in the context of consent statutes, the constitutional analysis applicable to parental consent statutes is similarly applicable to parental notification provisions; as a practical matter a notification requirement may well have the same deterrent effect on a minor seeking an abortion as a consent statute. *Pearson*, *supra*, 716 F.2d at 1131-1132, citing *Matheson*, *supra*, 450 U.S. at 420 & n.9 (Powell, J. concurring). Deterrence, of course, is one of the principal objectives of its proponents.

In *Ashcroft*, the Supreme Court upheld for the first time a statute requiring minors to secure parental or judicial consent, Mo. Rev. Stat. §188.028, because it provided for a judicial alternative consistent with established legal standards. 103 S. Ct. at 2525-2526. The Court noted that the Missouri statute assured anonymity by allowing a minor to use her initials on the petition and it exempted from the consent requirement and from the alternative requirement of a judicial proceeding "emancipated" women under the age of 18.[8] Further, the statute provided the framework for a constitutionally sufficient means

of expediting judicial proceedings by requiring that the appeal be perfected within five days from the filing of notice to appeal and by requiring that the Missouri supreme court "*shall*, by court rule, provide for expedited appellate review of cases appealed under this section." Mo. Rev. Stat. §188.028.2(6) (emphasis added).

In *Akron*, the Court invalidated a parental consent ordinance,[9] section 1870.05(B), because, among other reasons, it contained a blanket determination that *all* minors under the age of fifteen are too immature to make an abortion decision or that an abortion never may be in the minor's best interests without parental approval. *Akron*, *supra*, 103 S. Ct. at 2498. The Court found that the *Akron* ordinance was not "reasonably susceptible of being construed to create an 'opportunity for case-by-case evaluations of the maturity of pregnant minors.'" *Id.* at 2499, quoting *Bellotti II*, 443 U.S. at 643 n. 23.

In *Pearson*, the Seventh Circuit, applying the rationale of *Akron* and *Ashcroft*, struck down an Indiana statute as procedurally defective. The court found the Indiana statute more analogous to the ordinance invalidated in *Akron*, than to the statute upheld in *Ashcroft*. Unlike the Missouri statute, the Indiana statute did not "even mention appeals, much less specifying the time in which they must be perfected or directing the Indiana Supreme Court to promulgate rules governing expedited appellate review." *Pearson*, *supra*, 716 F.2d at 1135. The statute did not thus "assure" expeditious consideration of appeals, as required by *Bellotti II*. The Seventh Circuit concluded:

> If the statute had specified the procedure for appeals or at least directed the Indiana Supreme Court to promulgate rules governing expedited appeals, we would be satisfied. . . . As it is, however, the only assurance we have that Indiana courts will expedite appeals is the state's assertion that they will, yet we do not understand how, in the absence of legislation, the state has control over how the courts manage their dockets.

Pearson, *supra*, 716 F.2d at 1136-1137 (citation omitted). The court also noted that the statute impermissibly failed to provide for the appointment of counsel to minors.

We now consider the specific provisions of SB 521 under these relevant Supreme Court and Seventh Circuit guidelines.

Is Expedition Assured by SB 521?

Defendants argue that the procedures for judicial waiver of notice in section 5 of SB 521 "read like a checklist" of those constitutional requirements enunciated in *Bellotti II* and *Ashcroft*. We do not agree.

The Missouri statute upheld in *Ashcroft*, Mo. Rev. Stat. §188.028.2(6) (Supp. 1982), contained the following mandatory language: "[b]ecause time may be of the essence regarding performance of the abortion, the supreme court of this state *shall*, by court rule, provide for expedited appellate review of cases appealed under this section" (emphasis added). It also provided that "[t]he record on appeal shall be completed and the appeal shall be perfected within 5 days from the filing of the notice of appeal."

In contrast, sections 5(f) and (g) of SB 521 provide that an expedited confidential appeal shall be available "as the [Illinois] Supreme Court provides by rule" and "respectfully" requests the court to promulgate any necessary rules and regulations. This precatory language is far different than the directive found in the *Ashcroft* statute. Nor does SB 521 require that an appeal be perfected within a limited period of days, thereby ensuring expeditious review.

Defendants claim that the Illinois Supreme Court is "respectfully requested", rather than "directed" to issue the appropriate rules because under the Illinois constitution only the Illinois Supreme Court, and not the General Assembly, may establish rules for appeals. But this begs the question. The statute could have specified an adequate timetable and its effective date postponed until such

time as the Illinois Supreme Court established an appropriate rule. The fact is that the language of SB 521 simply does not reflect the necessity of rules governing expeditious appeals of abortion decisions. *Cf. Pearson, supra*, 716 F.2d at 1136 ("If the statute had *specified* the procedure for appeals or at least *directed* the Indiana Supreme Court to promulgate rules . . . we would be satisfied") (emphasis added).

We find ourselves in the same position as the Seventh Circuit in *Pearson*—we have no assurance that Illinois courts will expedite appeals except for the defendants' bare assertion that they will. But in the absence of legislation, the state does not have control over how courts manage their dockets. *Id.* at 1136-1137. No procedures now exist in the Illinois Supreme Court rules or otherwise for expeditious appeal from a trial court's denial of a pregnant minor's request for waiver of the notification requirement.

Confidentiality

The plurality in *Bellotti II* required that the alternative to parental consent must "assure" that the resolution of the issue "be completed with anonymity". 443 U.S. at 644. Plaintiffs contend that SB 521 does not assure anonymity either at the trial or appellate court level.

SB 521 does contain several provisions relating to confidentiality. Section 5(c) of the Act requires that court proceedings for waiver of notice be "confidential". Section 5(e) provides that the court order a "confidential" record of the evidence. Section 5(f) states that a "confidential" appeal shall be available "as the Supreme Court provides by rule. . . ." Section 5(g) respectfully requests the Illinois Supreme Court to promulgate rules necessary to ensure confidentiality of the proceedings. Defendants argue that these sections are broad enough to assure that a minor's or incompetent's petition for waiver of notice will be confidential and that her identity will not be disclosed.

Plaintiffs contend that defendants confuse confidentiality and anonymity, a distinction we find somewhat fine, but not without some merit.[10] As an example of a constitutionally adequate provision, plaintiffs refer us to the statutory provision in *Ashcroft* which assured anonymity by the provision that allows the minor to use her initials on the petition. 103 S. Ct. at 2525 n.16. Plaintiffs point out, as another example of the distinction between confidentiality and anonymity, the provision of the Illinois Juvenile Act that provides for confidential records, with certain exceptions, Ill. Rev. Stat. ch. 37, §702-9, but under which proceedings are brought in the name of the juvenile, thus eliminating anonymity. Plaintiffs urge that, while section 5(c) offers a pregnant minor confidential proceedings in the trial court, the delineated procedure does not guarantee anonymity at trial and on appeal as required by *Bellotti II* and *Akron*.

The same problem raised by sections 5(f) and (g) with respect to expeditious appeals is present with respect to the confidentiality, or, rather, anonymity, of appeals—the merely precatory language requesting the Illinois Supreme Court to provide rules relating thereto. We are also troubled by the section 7 exception to notice, the submission of signed *notarized* statements indicating that parents or the legal guardian have been notified, which will almost certainly compromise the anonymity of a minor seeking an abortion. Plaintiffs rightfully observe that submission to a notary of an affidavit stating that the parties have been previously notified of the minor's abortion decision may, in many communities, be tantamount to publication of the information in the local newspaper.

We conclude, therefore, that although SB 521 does sprinkle the word "confidential" throughout its provisions, it does not safeguard a minor's or incompetent's anonymity as required by *Bellotti II*, 443 U.S. at 644—the anonymity necessary to provide a private opportunity for an abortion to be obtained.

Failure to Provide Assistance

Plaintiffs also challenge as unconstitutional the procedures for obtaining waiver of the notification requirement because they fail to provide for assistance in initiating a petition and thus will deny many minors an effective opportunity to seek a waiver. Relying on the affidavits of Ruth Osgood and Alexa Markoff, plaintiffs contend that the task of filing a petition for waiver would be a daunting one for a pregnant minor, unless the court assisted her.

Section 5(b) does provide that the court appoint a guardian *ad litem* for the minor or incompetent and that the court provide her with counsel upon her request. Plaintiffs claim, however, that this does not solve the petition-filing problem, as counsel may be appointed only after the petition is filed. They say that SB 521 lacks the pre-filing assistance provided by the Missouri statute, Mo. Rev. Stat. §188.028.2(1), upheld in *Ashcroft* which directed the juvenile court to "assist the minor or next friend in preparing the petition and notices required pursuant to this section."

We recognize that gaining access to the judicial process is fraught with potential difficulties and "red tape", especially for a young woman who is already in a stressful situation. But, as defendants point out, it will be no more difficult for a minor to find and make initial contact with an Illinois circuit court than for a Missouri minor to find and make contact with the juvenile court, as required in the statute upheld in *Ashcroft*. And once she is present in the Illinois court, the court will appoint counsel upon her request, pursuant to section 5(b).

While we are not so sanguine as defendants in assuming that court clerks will exhibit alacrity in helping these adolescents file petitions, barring any directive to do so, we do believe that appointed counsel can assist her in many other subsequent aspects of the proceeding. *Cf. Pearson*, *supra*, 716 F.2d at 1138 n.11 (holding that the Indiana statute impermissibly failed to provide for the appointment of counsel to minors in waiver proceedings).

The Seventh Circuit implied that appointment of counsel after filing, rather than for pre-filing was constitutionally sufficient. *Id.* at n.11. ("We recognize that appointed counsel will not be available until after the minor has filed her petition, because a court has to know the minor is seeking to avoid notification in order to appoint counsel for her.") Therefore, we are unable to hold that pre-filing assistance is a *sine qua non* to an effective opportunity for obtaining judicial waiver and a constitutional statute. However, it would certainly be desirable to do so as was provided in the statute upheld in *Ashcroft*, *supra*, 103 S. Ct. at 2519, n. 4 (Mo. Rev. Stat. §188.028.2(1)).

SB 521 and "Incompetents"

Plaintiffs contend that section 4(a)'s requirement, that a physician notify an incompetent patient's guardian is unconstitutionally overbroad. Both plaintiffs and defendants charge that the other has misread the provisions of the Illinois Probate Act regarding "incompetents". Plaintiffs claim that the notice provisions of the Parental Notice Abortion Act will apply to persons for whom a guardian has been appointed, but who are nonetheless able to make responsible decisions with respect to pregnancy termination. Defendants say that those "responsible" persons are not included in the guardian provisions of sections 11a-3(a)(1) and 11a-3(a)(3) of the Probate Act, and thus the notice requirement of the Abortion Act will not apply to them.

Section 3 of the Parental Notice Abortion Act defines an "incompetent" as "any person who has been adjudged a disabled person and has had a guardian appointed for her as provided under Section 11a-3(a)(1) or Section 11a-3(3) [sic] of the Probate Act of 1975 [Article XIa, "Guardians for Disabled Adults"]." Ill. Rev. Stat. ch. 110½, §11a-3 provides:

11a-3. Adjudication of disability—Power to appoint guardian

§ 11a-3. Adjudication of disability—Power to appoint guardian. (a) Upon the filing of a petition by a reputable person or by the alleged disabled person himself or on its own motion, the court may adjudge a person to be a disabled person and may appoint (1) a guardian of his person, if because of his disability he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person.

Defendants contend that a person for whom a limited guardian has been appointed, under Ill. Rev. Stat. ch. 110½, §11a-12(c) (1981), is not an "incompetent" within the scope of section 3 of SB 521 nor under section 11a-3 of the Probate Act. Section 11a-12(c) provides:

(c) If the respondent is adjudged to be disabled and to lack some but not all of the capacity as specified in Section 11a-3, the court shall appoint a limited guardian of the respondent's person or estate or both. The court shall enter a written order stating the factual basis for its findings and the limits of the duties and powers of the guardian and the legal disabilities to which the respondent is subject.

Defendants also point out that Ill. Rev. Stat. ch. 110½, §11a-14(c) (1981) specifically provides that "[t]he appointment of a limited guardian under this article shall not constitute a finding of legal incompetence." Thus, they argue that, for notice to be required by section 4(a) of SB 521, it is necessary that a plenary guardian of the person be appointed and that occurs only when "the respondent is adjudged to be disabled and totally without capacity as specified in Section 11a-3. . . ." Ill. Rev. Stat. ch. 110½, §11a-12(b) (1981).[12]

We read the relevant portions of the Parental Notice Abortion Act and the Illinois Probate Act as follows: (1) an "incompetent", falling within the notice provisions of section 4(a) of the Abortion Act, is defined in section 3(e)

of the Abortion Act as an adjudged disabled person who has had a guardian appointed of her person, section 11a-3 (a)(1) of the Probate Act, or of her person and her estate, section 11a-3(a)(3) of the Probate Act; (2) a guardian "of her person" is appointed under section 11a-3(a)(1) only if a person "lacks sufficient understanding or capacity to make or communicate responsible decisions concerning [her] care . . ."; and (3) a guardianship "of her person and her estate", under section 11a-3(a)(3), encompasses the same requirement of lack of capacity and adds the requirement that she also be unable to manage her estate or her financial affairs. *Cf. Matter of McPeak's Estate*, 53 Ill. App. 3d 133, 136, 368 N.E.2d 957, 960 (1977) ("The capability to manage one's person does not resolve itself upon the question of whether the individual can accomplish tasks without assistance but rather whether that individual has the capacity to take care and intelligently direct that all his needs are met through whatever device is reasonably available under the circumstances.") *See also* Ill. Rev. Stat. ch. 110½, §11a-3(b) which provides:

(b) Guardianship shall be utilized only as is necessary to promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse, and to encourage development of his maximum self-reliance and independence. Guardianship shall be ordered only to the extent necessitated by the individual's actual mental, physical and adaptive limitations.

See Estate of Galvin v. Galvin, 112 Ill. App. 3d 677, 681, 445 N.E.2d 1223, 1225 (1983)

Under the new sections, the legislature has made it clear that although a person may be a disabled person, in the statutory sense of not being fully able to manage his person, a guardian is not therefore permissible or appropriate, if that person is capable of making and communicating responsible decisions concerning the care of his person. Thus, a person who was physically unable to care for himself, but who could direct others in such activity, would not neces-

> sarily need a guardian over his person. Similarly, a person might be a "disabled person" but nevertheless not be in need of a guardian over his estate, because with help from others he is able to direct and manage his affairs and estate.

quoting *Matter of Estate of Mackey*, 85 Ill. App. 3d 235, 238, 406 N.E.2d 226, 229-230 (1980).

Based upon the plain language of the Illinois Probate Act and relevant case law, we do not believe that the notice provisions of section 4 of the Abortion Act apply to those for whom a limited guardian has been appointed and who, unlike those for whom a plenary guardian has been appointed, may have sufficient ability to engage in meaningful decision-making. The notice provisions of the Abortion Act are not, therefore, constitutionally overbroad with respect to "incompetents". This conclusion, however, is based on the assumption that section 3(e) of SB 521 contains an incorrect citation to the nonexistent section 11a-3(3) and should refer to section 11a-3(a)(3). *See* n.12 *infra*. This ambiguity should be corrected.

Severability

We have thus far found that SB 521's 24 hour waiting period for notification is unconstitutional as is the judicial alternative to parental notice. On the other hand, we have found the provisions with respect to providing assistance and the definition of "incompetents" to be constitutionally sufficient though susceptible of improvement. The issue remaining for consideration is whether the entire Act must fall or whether those provisions that we have held unconstitutional can be properly severed. Our inquiry in this regard is twofold: (1) whether under Illinois law those provisions are severable; and (2) whether those provisions are constitutionally severable, that is whether the remaining sections, by themselves, can still pass constitutional muster.

Defendants contend that even though SB 521 lacks a severability clause within the Act itself, its provisions are

nevertheless severable due to the applicability of the general provision, Ill. Rev. Stat. ch. 1, §1032 (1981) which provides:

> 1032. Severability
>
> If any provision of an Act enacted after the effective date of this amendatory Act or application thereof to any person or circumstances is held invalid, such invalidity does not affect other provisions of applications of the Act which can be given effect without the invalid application or provision, and to this end the provisions of each Act enacted after the effective date of this amendatory Act are severable, unless otherwise provided by the Act.

By its very terms, the severability of section 1032 applies only to those provisions "which can be given effect without the invalid . . . provision." Given the invalidity of two basic provisions of the statute, the 24 hour waiting period and the waiver of notification procedures, there is little remaining to sever which would have any operative significance.

Other Considerations

SB 521 presents other difficulties which, though not raised explicitly by the parties, merit discussion, especially because this Act may be reenacted in an effort to comply with constitutional requirements.

We were troubled initially by the first provision of Section 8 providing that "any person . . . who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor." Although Ill. Rev. Stat. ch. 38, §4-4[13], defining "intent", and Ill. Rev. Stat. ch. 38, §4-5[14], defining "knowledge", provide relatively clear examples of proscribed conduct, we have serious doubt that Ill. Rev. Stat. ch. 38, §4-6[15], defining "recklessness", is applicable to the term "recklessly fails to conform" as stated in Section 8. While this may appear to be a mere semantic difficulty, it should

be cleared up to avoid a potential "void for vagueness" problem. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (impermissibly vague laws offend due process by not giving a person of ordinary intelligence a reasonable opportunity to know what is prohibited, by not giving those responsible for enforcement explicit standards of applying them, and they operate to inhibit the exercise of freedoms.) Since the "actual notice" provision itself presents problems, as we discuss *infra*, the standard of recklessly failing to conform to it compounds the difficulty.

The second provision of SB 521's Section 8, regarding civil actions against those who fail to provide persons with the requisite information presents a far more serious impediment. That paragraph states that failure to provide information is "prima facie evidence of failure to obtain informed consent and of interference with family relations" in a civil action and, further, that "the law of this State shall not be construed to preclude the award of *exemplary* damages" in appropriate civil actions. (Emphasis added). This language raises the possibility of actions in which there are *no* compensatory damages and yet, because of Section 8's wording, a plaintiff may be able to recover punitive damages without compensatory damage, *i.e.* without sustaining any actual damages at all!

Given the express language in the statute that Illinois law should "not be construed to preclude the award of exemplary damages," the above result might occur despite the well-settled law in Illinois that punitive damages may not be awarded in the absence of actual damages. *See, e.g., Jones v. Reagan*, 696 F.2d 551 (7th Cir. 1983); *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982); *Rhodes v. Uniroyal, Inc.*, 101 Ill. App. 3d 328, 427 N.E.2d 1380 (1981); *Ochoa v. Maloney*, 69 Ill. App. 3d 689, 387 N.E.2d 852 (1979). Punitive damages should not go beyond deterrence and become a windfall. *See Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983), *cert. denied sub nom. Argento Sansone v. Lenard*, 104 S. Ct. 69 (1983).

Additionally, it is equally well-established in Illinois that punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence, or when the defendant acts willfully and with wanton disregard of the rights of others. *Carter v. Mueller*, 120 Ill. App. 3d 314, 457 N.E.2d 1335 (1983), citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). *Cf. Hazelwood v. Ill. Central Gulf R.R.*, 114 Ill. App. 3d 703, 450 N.E.2d 1199, 1207 (1983) ("the nature of punitive damages in Illinois is clearly singular—it is *punishment* for the defendant") (emphasis in original). Punitive damages are in the nature of a criminal penalty and are not favored under the law. *Boddie v. Litton Unit Handling Systems, A Division of Litton Systems, Inc.*, 118 Ill. App. 3d 520, 455 N.E.2d 142 (1982).

The exemplary damages provision of Section 8 is further complicated because of its conjunction with "interference with family relations", a concept most often associated with the relationship between spouses—"loss of consortium", *see, e.g., Martin v. Kiendl Construction Co.*, 118 Ill. App. 3d 468, 438 N.E.2d 1187 (1982), and, in the abortion context, a somewhat nebulous concept.

Our research discloses no abortion statute that provides for exemplary damages in any civil action, let alone a criminal statute that attempts to create a tort whose boundaries are vague and ill-defined. For instance, La. Rev. Stat. Ann. §40:1299.35.5 (West Supp. 1984) (parental consent statute providing a constitutionally adequate alternative procedure, *Application of Doe*, 407 So. 2d 1190 (La. Sup. 1981)) provides only that violations of its provisions result in a fine of not more than $1000 or imprisonment for not more than two years or both. *Id.* at §40:1299.35.18. The North Dakota Abortion Control Act, providing for notice to parents, provides only for criminal penalties. *See* N.D. Cent. Code §14-02.1-04,05, *et seq.* (The statute, struck down in *Leigh v. Olson*, 497 F. Supp. 1340 (N.D. 1980) because the notice provisions applied in *every* case regardless of the maturity of a minor, was reenacted. S.L. 1981, ch. 164, §1.) Tennessee's notice provision

similarly provides for criminal penalties only. *See* Tenn. Code Ann. §39-4-201(b)(1), *et seq.* (1982). *See also* Utah Code Ann. §76-7-304 (1978) (notification, "if possible", and criminal penalty for violation) (upheld in *H.L. v. Matheson*, 450 U.S. 398 (1981)); Mass. Gen. Laws Ann. ch. 112, §§12N, 12T (West Supp. 1981); Ohio Rev. Code Ann. §2919.12(C) (1981).

Still another source of potential confusion engendered by SB 521 is its requirement and definition of "actual notice". Section 3(c) states that actual notice is "giving notice directly or by telephone." But this leaves numerous questions unanswered. Is a physician expected to seek out the parents at their home or place of work in order to effect direct notice? How many times must he or she try to reach them by telephone before the physician can be said to "recklessly fail" to give notice?

There is no constructive notice provision in SB 521 which would permit a physician to fulfill the notice requirement by certified mail to the last known address of the parents. This provision, present in other notification statutes, can alleviate the vagaries of telephone notice and furnish conclusive and relatively speedy proof of notice. *Cf.* Ind. Code §35-1-58.5-2.5 (48 hour constructive notice provision held presumptively constitutional in *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983); Me. Rev. Stat. Ann. Tit. 22, §1592.2.A,B (1980) (if 24 hours actual notice is not possible, written notice by certified mail to last known address, mailed 48 hours before the abortion); N.D. Cent. Code §14-02.1-03.1 (same).

The difficulty posed by SB 521's Section 3(c) is that actual or telephone notice may *never* be effectuated, thus either postponing for a significant period of time or effectively denying altogether, a minor's access to abortion. This delay is particularly egregious in the abortion context where time is truly of the essence. We believe that an alternative provision, allowing for constructive notice in the event direct or telephone notice is unavailing within a short period of time is desirable, if not necessary, to remedy the defect.

Conclusion

Plaintiffs' motion for summary judgment is granted. Defendants are enjoined from enforcing any provisions of the Parental Notice Abortion Act of 1983. An appropriate order will enter.

ENTER:

/s/ Hubert L. Will
United States District Judge

DATED: May 4, 1984

FOOTNOTES

[1] Persons in the plaintiff class include (1) unemancipated minors allegedly capable of giving informed consent to an abortion procedure and those whose best interests would not be served by notice to both parents or, if applicable, to a legal guardian; and (2) adjudicated disabled persons for whom a guardian has been appointed, pursuant to Ill. Rev. Stat. ch. 110½, §§11a-3(a)(1) or 11a-3(a)(3), whose disability allegedly does not impair ability to give informed consent or whose best interests would not be served by notice to the guardian. As we read the Illinois Probate Act, the second category is not properly a member of the plaintiff class, *see* discussion *infra*, as SB 521 does not apply to such persons. (SB 521's reference to section 11a-3(3) is ambiguous as there is no such section in the Probate Act. *See* discussion *infra*.)

[2] Defendants' motion papers were filed by Neil Hartigan, Attorney General of Illinois. Defendant Richard M. Daley has adopted Hartigan's motion for summary judgment, memorandum, and reply.

[3] The Act is set forth fully in Appendix I to this opinion.

[4] SB 521 was passed on third reading, 44 yes, 8 no, 2 present. The veto override vote was 44 yes, 10 no, and 1 present.

[5] The decade has been marked by the increasing, and we believe, unfortunate, "politicization" of the abortion issue. *See, e.g.*, Note, *The Supreme Court, 1982 Term*, 97 Harv. L. Rev. 78 & n.3 (1983), citing *After Roe v. Wade: 10 Years Conflict over Abortion*, Wash. Post. Jan. 23, 1983, at AI, col. I.

[6] *But see H.L. v. Matheson*, 450 U.S. 398, 453 (1981) (Marshall, J., dissenting) ("some minors, in some circumstances, have the capacity and need to determine their health care needs without involving their parents"); Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 Neb. L. Rev. 455, 467 & n. 63 (1983) (research suggests that adolescents are no less competent than adults in making decisions about health care matters); Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 Colum. L. Rev. 1251, 1255-1256 (1980) (instead of "fantasizing" that pregnancy will "magically disappear", minor's decision to seek abortion is itself a signal of maturity). *See also* Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980); Hofmann, *Consent and Confidentiality, Their Legal and Ethical Implications for Adolescent Medicine*, in Medical Care of the Adolescent 42, 51 (J. Gallagher, F. Heald, & D. Garell eds., 3d ed. 1976) ("[o]ne can well argue that an adolescent old enough to make the decision to be sexually active . . ., and who is then responsible enough to seek professional assistance for his or her problem, is ipso facto mature enough to consent to his own health care.")

[7] Plaintiffs offer the affidavits of Drs. Charles and Zbaraz, Alexa Markoff, presently a social worker at the Pregnancy Termination Unit at Michael Reese Hospital and Medical Center, and Ruth Osgood, Director of Educational Services as the Concord Medical Center, Chicago, Illinois, to support their claim that the waiting period significantly burdens pregnant minors seeking abortions by adding additional stress, costs, and, by additional delay, increasing the potential for medical complications. Pl. Mem. for Prelim. Injunction. *Cf. Matheson, supra*, 450 U.S. at 412, in which appellants challenged a parental notification statute as unconstitutional for failure to *include* a mandatory period of delay after the physician notifies the parents.

[8] In *Danforth, supra*, 428 U.S. at 75, the Court held unconstitutional Missouri's parental consent requirement for all unmarried minors under the age of 18.

[9] The Court of Appeals upheld §1870.05(A), a 24 hour parental notice provision, as a constitutionally permissible regulation insofar as it applied to immature and dependent minors who live with their parents and are not emancipated by marriage or otherwise. *Akron*, 651 F.2d 1198, 1206 (6th Cir. 1981). ("Until the requirements of section 1870.05(A) are questioned by a minor who claims to be mature or emancipated or claims that notice would not be in her best interest, we cannot hold the section facially invalid.") (The plaintiffs before the Sixth Circuit in *Akron* were abortion clinics and a physician. *Id.* at 1205.) The validity of the Sixth Circuit's ruling was not challenged in the Supreme Court. *Akron, supra*, 103 S. Ct. at 2497 n. 29.

[10] Webster's Third New International Dictionary (1963) defines "confidential" as "known only to a limited few", "not publicly disseminated." "Anonymity" is defined as an "absence or lack of identification", being anonymous or "nameless".

[11] There is no section 11a-3(3) in the Illinois Probate Act. Thus, our discussion of the issues relevant to incompetents is based on the assumption that the legislature's intended reference is to section 11a-3(a)(3). This confusion should be remedied in any future draft of the Parental Notification Act.

[12] One commentator notes that these provisions of the guardianship for disabled adults legislation of 1978 and 1979, at issue here, expand the due process protections afforded an alleged disabled person and encourage those involved in the guardianship process to discern and utilize guardianship alternatives least restrictive of a disabled person's rights. *See* Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from Their Zealous Protectors*, 56 Chi.Kent L.Rev. 1087 (1980).

[13] Ill. Rev. Stat. ch. 38, §4-4 (1983) provides:

§ 4-4. Intent

A person intends, or acts intentionally or with intent to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct.

Laws 1961, p. 1983, § 4-4, eff. Jan. 1, 1962.

[14] Ill. Rev. Stat. ch. 38, §4-5 (1983) provides:

§ 4-5. Knowledge

A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct.

Conduct performed knowingly or with knowledge is performed wilfully within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

Laws 1961, p. 1983, § 4-5, eff. Jan. 1, 1962.

[15] Ill. Rev. Stat. ch. 38, §4-6 provides:

§ 4-6. Recklessness

A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. An act performed recklessly is performed wantonly, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

Laws 1961, p. 1983, § 4-6, eff. Jan. 1, 1962.

[16] At the time this opinion was issued, our research disclosed no cases challenging parental notification statutes in the abortion context in the wake of *Akron* and *Ashcroft*, except the Indiana statute challenged in *Pearson*. However, in *Planned Parenthood Ass'n v. Matheson*, No. C-83-0607W (D. Utah Dec. 30, 1983), the District Court declared invalid a Utah statute requiring any person providing contraceptives to a minor "to notify, whenever possible," the minor's parents because it failed to provide a constitutionally adequate alternative procedure. The court's analysis was based, in part, on *Roe v. Wade*, *H.L. v. Matheson* and *Akron*.

APPENDIX 1

PARENTAL NOTICE ABORTION ACT
PUBLIC ACT 83-890
SENATE BILL 521

AN ACT relating to notice of abortions performed on minors and incompetents, and to repeal Section 3.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

[S.H.A. ch. 38, ¶ 81-61]

Section 1. Short title. This Act shall be known and may be cited as the Parental Notice of Abortion Act of 1983.

[S.H.A. ch. 38, ¶ 81-62]

Section 2. Legislative purpose and findings. (a) It is the intent of the legislature in enacting this parental notice provision to further the important and compelling State interests of: 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their household.

(b) The legislature finds as fact that: 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essen-

tial to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

[S.H.A. ch. 38, ¶ 81-63]

Section 3. Definitions. For purposes of this Act, the following definitions will apply:

(a) "minor" means any person under the age of 18;

(b) "emancipated minor" means any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents;

(c) "actual notice" means the giving of notice directly, in person or by telephone;

(d) "abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth;

(e) "incompetent" means any person who has been adjudged a disabled person and has had a guardian appointed for her as provided under Section 11a-3(a)(1) or Section 11a-3(3) of the Probate Act of 1975.[1]

[1] Chapter 110½, ¶ 11a-3.

[S.H.A. ch. 38, ¶ 81-64]

Section 4. Notice required. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform an abortion or unless he or his agent has received a written statement or oral communication by another physician, hereinafter called the "referring physician", certifying that the referring physician or his agent has given such notice.

(b) If the minor's or incompetent's parents are divorced, or one parent is not available to the person performing the abortion or his agent or the referring physician or his agent in a reasonable time or manner, then notice to the parent with custody or to the parent who is available shall be sufficient. If neither parent nor the legal guardian is available to the person performing the abortion or his agent or the referring physician or his agent within a reasonable time or manner, notice to any adult person standing in loco parentis shall be sufficient.

(c) A minor or incompetent who objects to notice being given her parents or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement of this section pursuant to the procedures of Section 5 of this Act.[1]

[1] Paragraph 81-65 of this chapter.

[S.H.A. ch. 38, ¶ 81-65]

Section 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act[1] requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

[1] Paragraph 81-64 of this chapter.

[S.H.A. ch. 38, ¶ 81-66]

Section 6. Medical emergency exception. The requirements of Section 4 of this Act shall not apply when, in the best medical judgment of the physician on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis for failure to give notice shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. Dissemination of an original and a redacted copy

of this report shall comply with the reporting and confidentiality requirements of Section 10 of the Illinois Abortion Law of 1975.

[1] Paragraph 81-64 of this chapter.

[S.H.A. ch. 38, ¶ 81-67]

Section 7. Other exceptions. (a) When the parties to whom notice must be given pursuant to Section 4 of this Act[1] have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit signed notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply.

(b) Notwithstanding any other provision of this Act, no notice need be given to any father of any minor requesting an abortion when the minor's mother accompanies her to the abortion and submits a notarized statement that she has been notified and, further, states orally to the physician or his agent that she has a reasonable belief that the fetus to be aborted is the child of the minor's father. Where the mother is deceased or otherwise unavailable, the physician or his agent may rely on a similar statement provided by any other adult relative accompanying the minor. Any physician or his agent relying on such a statement in good faith shall not be civilly or criminally liable under any provisions of this Act for failure to give notice. Nothing in subsection (b) shall be construed to limit the alternative and additional right of a minor to seek a waiver of the notice requirement in accordance with Section 5[2] on the ground that notice would not be in the best interests of the minor because the fetus to be aborted is the child of the minor's father.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-65 of this chapter.

[S.H.A. ch. 38, ¶ 81-68]

Section 8. Penalty. Any person who intentionally performs an abortion with knowledge that, or with reckless

disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent, and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor.

Failure to provide persons with information pursuant to the requirements of this Act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

Such prima facie evidence shall not apply to any issue other than failure to inform the parents or guardian and interference with family relations in appropriate civil actions.

(Ch. 38, rep. par. 81-23.3) [S.H.A. ch. 38, ¶ 81-69]

Section 9. Section 3.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended,[1] is repealed.

[1] Paragraph 81-23.3 of this chapter.

[S.H.A. ch. 38, ¶ 81-70]

Section 10. This Act takes effect 90 days after it becomes a law.

VETO OVERRIDDEN: Nov. 2, 1983
EFFECTIVE: Jan. 31, 1984

Additions in text are indicated by underline; deletions by ~~strikeouts~~

APPENDIX C

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 20, 1985.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. WESLEY E. BROWN, *Senior District Judge**

Nos. 84-1958
84-1959

DAVID ZBARAZ, M.D., & ALLEN G. CHARLES, M.D., Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

vs.

NEIL F. HARTIGAN, Attorney General of the State of Illinois and RICHARD M. DALEY, State's Attorney of Cook County, Illinois,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 84 C 771—**Hubert L. Will, Judge.**

* The Honorable Wesley E. Brown, Senior Judge of the United States District Court for the District of Kansas, is sitting by designation.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED in part, VACATED in part, and the case is REMANDED, with instructions, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

APPENDIX D

NOS. 84-1958 and 84-1959

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees,

vs.

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois, their agents and successors and all others similarly situated,

Defendants-Appellants.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 84 C 771—**Hubert L. Will**, *Judge Presiding.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that NEIL F. HARTIGAN, defendant-appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the United States Court of Appeals for the Seventh Circuit

enjoining enforcement of the Illinois Parental Notice of Abortion Act of 1983, entered in this action on May 20, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROMA JONES STEWART
Solicitor General

State of Illinois Center
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-3000

BY: /s/ _____
RITA M. NOVAK
Assistant Attorney General
100 West Randolph Street
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Chicago, Illinois 60601
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APPENDIX E

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONST. amend. XIV, §1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

ILLINOIS PARENTAL NOTICE OF ABORTION ACT OF 1983

Ill. Rev. Stat. ch. 38, ¶81-61 (West Supp. 1984):

81-61. Short title

§ 1. Short title. This Act shall be known and may be cited as the Parental Notice of Abortion Act of 1983.

Ill. Rev. Stat. ch. 38, ¶81-62 (West Supp. 1984):

81-62. Legislative purpose and findings

§ 2. Legislative purpose and findings. (a) It is the intent of the legislature in enacting this parental notice provision to further the important and compelling State interests of: 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their household.

(b) The legislature finds as fact that: 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention

after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

Ill. Rev. Stat. ch. 38, ¶81-63 (West Supp. 1984):

81-63. Definitions

§ 3. Definitions. For purposes of this Act, the following definitions will apply:

(a) "minor" means any person under the age of 18;

(b) "emancipated minor" means any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents;

(c) "actual notice" means the giving of notice directly, in person or by telephone;

(d) "abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth;

(e) "incompetent" means any person who has been adjudged a disabled person and has had a guardian appointed for her as provided under Section 11a-3(a)(1) or Section 11a-3(3) of the Probate Act of 1975.[1]

[1] Chapter 110½, ¶ 11a-3.

Ill. Rev. Stat. ch. 38, ¶81-64 (West Supp. 1984):

81-64. Notice required

§ 4. Notice required. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician, here-

inafter called the "referring physician", certifying that the referring physician or his agent has given such notice.

(b) If the minor's or incompetent's parents are divorced, or one parent is not available to the person performing the abortion or his agent or the referring physician or his agent in a reasonable time or manner, then notice to the parent with custody or to the parent who is available shall be sufficient. If neither parent nor the legal guardian is available to the person performing the abortion or his agent or the referring physician or his agent within a reasonable time or manner, notice to any adult person standing in loco parentis shall be sufficient.

(c) A minor or incompetent who objects to notice being given her parents or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement of this section pursuant to the procedures of Section 5 of this Act.[1]

[1] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. ch. 38, ¶81-65 (West Supp. 1984):

81-65. Procedure for waiver of notice

§ 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent. These proceedings shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act[1] requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

Ill. Rev. Stat. ch. 38, ¶81-66 (West Supp. 1984):

81-66. Medical emergency exception

§ 6. Medical emergency exception. The requirements of Section 4 of this Act[1] shall not apply when, in the best medical judgment of a physician based on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis for any medical judgment that warrants failure to give notice pursuant to this Act shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. Dissemination of this report shall comply with the reporting and confidentiality requirements of Section 10 of the Illinois Abortion Law of 1975.[2]

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-30 of this chapter.

Ill. Rev. Stat. ch. 38, ¶81-67 (West Supp. 1984):

81-67. Other exceptions

§ 7. Other exceptions. (a) When the parties to whom notice must be given pursuant to Section 4 of this Act[1] have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit signed notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply.

(b) Notwithstanding any other provision of this Act, no notice need be given to any father of any minor requesting an abortion when the minor's mother accompanies her to the abortion and submits a nota-

rized statement that she has been notified and, further, states orally to the physician or his agent that she has a reasonable belief that the fetus to be aborted is the child of the minor's father. Where the mother is deceased or otherwise unavailable, the physician or his agent may rely on a similar statement provided by any other adult relative accompanying the minor. Any physician or his agent relying on such a statement in good faith shall not be civilly or criminally liable under any provisions of this Act for failure to give notice. Nothing in subsection (b) shall be construed to limit the alternative and additional right of a minor to seek a waiver of the notice requirement in accordance with Section 5[2] on the ground that notice would not be in the best interests of the minor because the fetus to be aborted is the child of the minor's father.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. ch. 38, ¶81-68 (West Supp. 1984):

81-68. Penalty

§ 8. Penalty. Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent, and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor.

Failure to provide persons with information pursuant to the requirements of this Act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

Such prima facie evidence shall not apply to any issue other than failure to inform the parents or guardian and interference with family relations in appropriate civil actions.

Ill. Rev. Stat. ch. 38, ¶81-68.1 (West Supp. 1984):

81-68.1. Invalidity—Severability

§ 8.1. If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

Added by P.A. 83-1128, § 3, eff. June 30, 1984.

Ill. Rev. Stat. ch. 38, ¶81-70 (West Supp. 1984):

81-70. Effective date

§ 10. This Act takes effect 90 days after it becomes a law.

APPENDIX G

STATUTES OF OTHER JURISDICTIONS

Those states which have required parental notification are: Arizona, Ariz. Rev. Stat. Ann. §36-2152 (Supp. 1984); Idaho, Idaho Code §18-609 (Supp. 1985); Illinois, Ill. Rev. Stat. ch. 38, § 81-64 *et seq.* (West Supp. 1984); Maine, Me. Rev. Stat. Ann. tit. 22, § 1597 (1980); Maryland, Md. Health—Gen. Code Ann. §20-103 (1982); Minnesota, Minn. Stat. Ann. §144.343 (West Supp. 1985); Montana, Mont. Code Ann. §50-20-107 (1983); Nebraska, Neb. Rev. Stat. §28-347 (Supp. 1984); Nevada, Nev. Rev. Stat. §442.255, *amended by* Act of June 14, 1985, ch. 681, 1985 Nev. Adv. Sheets 2306; Tennessee, Tenn. Code Ann. §39-4-202(f) (1982); Utah, Utah Code Ann. §76-7-304 (1978); West Virginia, W. Va. Code §16-2F-3 (1985).

Those states which have required parental consent are: Alaska, Alaska Stat. §18.16.010 (1981); Arkansas, Ark. Stat. Ann. § 41-2555 (1977); Delaware, Del. Code Ann. tit. 13, §708 (1981); Florida, Fla. Stat. Ann. §390.001 (4)(a) (West Supp. 1985); Indiana, Ind. Code Ann. § 35-1-58.5-2.5 (Burns Supp. 1985); Kentucky, Ky. Rev. Stat. § 311.732 (1983); Louisiana, La. Rev. Stat. Ann. §40:1299.35.5 (West Supp. 1985); Massachusetts, Mass. Gen. Laws Ann. ch. 112, § 12 (1982); Missouri, Mo. Ann. Stat. §188.028 (Vernon 1982); North Dakota, N.D. Cent. Code §14-02.1-03.1 (1981); Pennsylvania, 18 Pa. Cons. Stat. Ann. §3206 (Purdon 1983); Rhode Island, R.I. Gen. Laws §23-4.7-6 (Supp. 1984); South Carolina, S.C. Code Ann. §44-41-30 (Law Co-op. 1985); South Dakota, S.D. Codified Laws Ann. §34-23A-7 (1977).

Some of these statutes have been declared unconstitutional. *See, e.g., Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985) (Illinois); *American College of Obstetricians v. Thornburg*, 737 F.2d 283 (3d Cir. 1984), *juris. postponed*, ____ U.S. ____, 105 S.Ct. 2015 (1985) (Pennsylvania); *Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 1981) (Florida); *Glick v. McKay*, No. CV-R-85-331-ECR (D. Nev. July 17, 1985), *appeal pending*, No. 85-2335 (9th Cir.) (Nevada); *Eubanks v. Brown*, 604 F. Supp. 141 (W.D. Ky. 1984) (portions of Kentucky statute held unconstitutional); *Orr v. Knowles*, No. CV-81-0-301 (D. Neb. Sept. 19, 1983) (Nebraska); *Women's Community Health Center v. Cohen*, 477 F. Supp. 542 (D. Me. 1979) (Maine); *Floyd v. Anders*, 440 F. Supp. 535 (D.S.C. 1977) (South Carolina); *L.R. v. Hanson*, No. C-80-0078 J (D. Utah Feb. 8, 1980) (Utah statute unconstitutional as applied to mature emancipated minors); *Planned Parenthood of Nashville v. Alexander*, No. 79-843-II (Tenn. Chancery Ct. Oct. 24, 1979) (Tennessee).

Other statutes have survived constitutional challenges. *See, e.g., Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517, 76 L.Ed.2d 733 (1983) (Missouri); *H.L. v. Matheson*, 450 U.S. 398, 101 S. Ct. 1164, 67 L.Ed.2d 388 (1981) (Utah statute constitutional as applied to unemancipated immature minors); *Planned Parenthood League v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981) (Massachusetts); *C.L.G. v. Webster*, 85-4302-CV-C-5 (W.D. Mo. Aug. 8, 1985), *appeal pending*, No. 85-2007WM (8th Cir.) (Missouri); *Hodgson v. Minnesota*, No. 3-81-CV-538 (D. Minn. Mar. 22, 1982 and Jan. 23, 1985) (Minnesota); *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984) (Louisiana).

MOTION

No. 85-673

Supreme Court, U.S.
FILED
DEC 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois, his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors, and on behalf of all others similarly situated,

Appellants,

VS.

DAVID ZBARAZ, M.D., and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all Illinois physicians performing or desiring to perform abortions and on behalf of their minor patients desiring abortions,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether § 4(a) of the Illinois Parental Notice of Abortion Act, which imposes a mandatory 24-hour waiting period after a parental notice is given but before an abortion can be performed, is inconsistent with this Court's decision in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S 416 (1983) ("*Akron*"), striking down a mandatory waiting period that applied to both adult and minor women?

2. Whether the judicial procedures which present an alternative to mandatory parental notice, and which do not assure either that the identity of the minor seeking an abortion will remain anonymous or that the minor's request will be adjudicated in an expeditious manner contravene this Court's holdings in *Akron* and *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476 (1983) ("*Ashcroft*")?

PARTIES

The defendants below, Neil F. Hartigan, in his official capacity as Attorney General of the State of Illinois, his agents and successors, and Richard M. Daley, in his official capacity as State's Attorney for Cook County, Illinois, his agents and successors, and as the representative of all Illinois State's Attorneys, are appellants herein. The plaintiffs below, David Zbaraz, M.D., and Allan G. Charles, M.D., on behalf of a class of physicians similarly situated, and on behalf of their minor patients, are appellees herein.

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OPINIONS BELOW

(See Jurisdictional Statement.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois, his agents and successors, RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors, and on behalf of all others similarly situated.

Appellants,

VS.

DAVID ZBARAZ, M.D., and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all Illinois physicians performing or desiring to perform abortions, and on behalf of their minor patients desiring abortions,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

The appellees, David Zbaraz, M.D., and Allan G. Charles, M.D., move the Court to dismiss the appeal or, in the alternative, to affirm the judgment of the court of appeals, for the following reasons:

STATEMENT OF THE CASE

A. The Illinois Parental Notice Of Abortion Act Requires Notice To Both Parents Of A Minor Seeking An Abortion And Imposes A Mandatory Waiting Period After Notice Is Effectuated.

The Illinois General Assembly enacted the Illinois Parental Notice of Abortion Act of 1983 (the "Act"), Ill. Rev. Stat. ch. 38, ¶ 81-61 *et seq.*, over the veto of Governor James R. Thompson. Governor Thompson vetoed the Act because it "contain[ed] many glaring constitutional deficiencies" and did not comport with this Court's decisions in *Akron*, 462 U.S. 416 (1983), and *Bellotti v. Baird*, 443 U.S. 622 (1979) (*"Bellotti"*). Three express legislative purposes provided the foundation for the Act, which would regulate every abortion performed for a pregnant minor in the State of Illinois. Those legislative purposes, as set forth in the Act, are: protecting the rights of parents to rear their children; fostering the family structure and preserving it as a viable social unit; and, protecting pregnant minors against their own immaturity when faced with the abortion decision. Ill. Rev. Stat. ch. 38, ¶ 81-62(a).

Under the terms of the Act, no physician can perform an abortion for a pregnant minor without first giving "actual notice" of the intended abortion to both parents of the pregnant minor, and waiting at least 24 hours after notice is effectuated to perform the abortion. Ill. Rev. Stat. ch. 38, ¶ 81-64(a) (hereinafter § 4(a)).[1] Only those minors who can persuade both parents to accompany them to the abortion facility or to sign notarized statements approving the abortion do not have to

[1] Section 6 of the Act waives the requirements of § 4 when a "medical emergency exists that so complicates the pregnancy as to require an immediate abortion." Ill. Rev. Stat. ch. 38, ¶ 81-66. The entire Act is set forth at pp. 93-99 of the Appendix (hereinafter "App.") filed by appellants in conjunction with their jurisdictional statement (hereinafter "Juris. St.").

defer effectuation of their decision. Ill. Rev. Stat. ch. 38, ¶ 81-67 (hereinafter § 7).

Under § 4(c) of the Act, minors who do not wish their parents to be notified are required to file a petition, complying with § 5 of the Act, in the circuit court of the county in which the abortion would be performed or the county in which the minor lives, to seek a waiver of the notice requirement. Section 5 of the Act allows waiver of notice to both parents only if the minor can establish either that she is mature enough to make the abortion decision or that waiver of the notice would be in her best interests. Section 5 does not establish a specific method to protect the anonymity of minors who petition the court for waiver of parental notice. Nor does § 5 or any other provision of the Act establish a specific time frame to assure expeditious appeal of an adverse decision in the circuit court.

Physicians who perform an abortion for a minor without providing the requisite notice are subject to criminal prosecution. Ill. Rev. Stat. ch. 38, ¶ 81-68. Failure to provide notice also constitutes a prima facie case of "interference with family relations" and leaves the physician liable for exemplary damages in a civil action. *Id.*

B. Appellees Challenged The Parental Notice Act As Providing Insufficient Protection Of A Pregnant Minor's Fundamental Right To Choose An Abortion.

Appellees challenged the constitutionality of the Act on behalf of a certified class of minor women desiring abortions, and on behalf of a certified class of physicians performing, or desiring to perform, abortions for minor and disabled women. Named as defendants were Attorney General Hartigan and State's Attorney Daley of Cook County, who served as the representative of a defendant class of all Illinois State's Attorneys.

In proceedings before the district court, appellees established that the 24-hour waiting period imposed a heavy burden

on pregnant minors. Most notably, appellees demonstrated that the waiting period increased the cost of the abortion, increased the stress to the young woman, delayed the procedure itself, increased the risk of medical complications, and contravened best medical practices. (Affidavits of Zbaraz at ¶ 5, Charles at ¶ 5(b), and Osgood at ¶¶ 6, 7.)[2] Appellees also established that the judicial by-pass procedures contained in § 5 would confuse minors, cause additional postponement of the abortion procedure, increase the stress of the situation (Osgood affidavit at ¶ 5), and cause many minors to "end up having unwanted children or seeking an illegal, dangerous abortion procedure." (Markoff affidavit at ¶¶ 4, 5).

The district court entered a temporary restraining order on January 26, 1984, which was continued by agreement of the parties until an adjudication on the merits could be held. Cross motions for summary judgment were filed and on May 4, 1984, the district court issued a memorandum opinion declaring the Act unconstitutional and permanently enjoining defendants from enforcing it. Relying upon this Court's decision in *Akron*, the district court found that the 24-hour waiting period in § 4(a) imposed an unconstitutional burden on a woman's abortion choice by causing delay and increasing cost. (App. 62, 584 F. Supp. at 1459.)[3] The district court also ruled that the judicial waiver procedures in § 5 were constitutionally defective because they failed to assure that the waiver of notice proceedings would be completed in a timely enough manner to allow a safe abortion to be performed or to assure the pregnant minor of anonymity at either the trial court level or on appeal. (App. 65-67, 584 F. Supp. at 1460-62.) Although the district court

[2] These affidavits were filed with the district court in support of plaintiffs-appellees' request for injunctive relief and were included in the Supplemental Appendix appellees filed in the court of appeals.

[3] The full text of both the court of appeals' decision and that of the district court are set forth in appellants' appendix. References to these decisions will include both a citation to the relevant appendix page and a citation to the published opinion.

upheld other provisions of the Act, it declined to sever these provisions, finding that the Act would have little operative significance without the 24-hour notice provision and the judicial waiver provisions. (App. 72-73, 584 F. Supp. at 1464-65.) Thus, the district court permanently enjoined the entire Parental Notice Act.

Following this Court's decisions in *Akron*, 462 U.S. 416 (1983), and *Ashcroft*, 462 U.S. 476 (1983), the United States Court of Appeals for the Seventh Circuit substantially affirmed the decision of the district court. The court of appeals found that the delay caused by the mandatory 24-hour waiting provision constituted a great burden on a minor woman's right to terminate pregnancy. (App. 4-8, 763 F.2d at 1535-38.) The court of appeals also held that § 5 of the Act did not provide adequate assurances that a minor's anonymity would be preserved during a judicial proceeding seeking waiver of the notice provision or that an appeal from an adverse circuit court decision would proceed with sufficient expedition to effectively allow an abortion to be obtained. (App. at 11-20, 763 F.2d at 1538-44.)

Unlike the district court, however, the court of appeals did not declare the entire Parental Notice Act unconstitutional. Instead, that court severed the 24-hour waiting period from the remainder of § 4, which it then found constitutional because it provided only that notice of a pregnant minor's desire to have an abortion be given to her parents. (App. 22, 763 F.2d at 1545.) Because the Act, as thus limited, would have a constitutional notice provision, the court of appeals found that the remainder of the Parental Notice Act, with the exception of § 5, was not unconstitutional on its face. It therefore vacated the district court's holding that the entire Act was unconstitutional. (App. 23, 763 F.2d at 1545.)

The court of appeals did not lift the district court's injunction stopping enforcement of the Parental Notice Act. It found that § 5, as drafted by the Illinois General Assembly, did

not assure either anonymous or expeditious judicial proceedings. (App. 10-20, 763 F.2d at 1539-44.) Although § 5 asked the Illinois Supreme Court to promulgate rules establishing these constitutionally mandated protections, the Illinois Supreme Court had not acted. Thus, the court of appeals continued the injunction on the Act until such time as the Illinois Supreme Court promulgates rules assuring anonymous and prompt proceedings that preserve the abortion option for any pregnant minor who seeks judicial waiver of the provision requiring actual notice to both of her parents. (App. 14, 20, 763 F.2d at 1541, 1544.) It is of this decision that appellants seek review.

I.

THE CONSTITUTIONAL STANDARDS BY WHICH PARENTAL CONSENT OR NOTICE STATUTES ARE EVALUATED ARE NOT IN DISPUTE; THUS, APPELLANTS FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION DESERVING OF THIS COURT'S REVIEW.

Since the seminal decision of *Roe v. Wade*, 410 U.S. 113 (1973) ("*Roe*"), this Court consistently has recognized the fundamental right of all women, including minors, to choose to have an abortion. Most recently in *Akron*, the constitutional parameters of legislation regulating abortion were clearly reaffirmed: such state regulation is subject to strict judicial scrutiny and may be sustained only if the state meets its burden of demonstrating that a compelling governmental interest is furthered by the regulation and that the regulation is tailored narrowly so as to advance only that interest. *Akron*, 462 U.S. at 427-30. *See also Roe*, 410 U.S. at 155.[4]

[4] At approximately the end of the first trimester of pregnancy, the state's interest in safeguarding women's health becomes compelling enough to justify narrowly drawn regulations that maintain medical

(footnote continued on following page)

Although states have a "significant" interest in ensuring that pregnant minors act in their best interests when exercising their fundamental right to choose an abortion, *Akron*, 462 U.S. at 427-28 n.10, state regulation of pregnant minors seeking abortions is strictly scrutinized.[5] In *Akron*, the Court clearly reiterated the constitutional standards by which such regulation is evaluated. A "State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor." *Akron*, 462 U.S. at 439, *quoting Planned Parenthood of Central Missouri v.*

(footnote continued from preceding page)

standards. *Akron*, 462 U.S. at 428-30. After viability, the state's interest in protecting potential life justifies proscription of abortions except those necessary to preserve the life or health of the pregnant woman. *Id.*

[5] When evaluating parental involvement statutes, the Seventh Circuit consistently has used the strict scrutiny test set forth by this Court to evaluate both parental notice and parental consent statutes. *See Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983), *citing Akron*, 462 U.S. at 427-28 n.10.

The parental notice statute upheld in *H. L. v. Matheson*, 450 U.S. 398 (1981) ("*Matheson*"), applied only to immature, dependent minors. 450 U.S. at 407, 409, 411. Both emancipated and mature minors were exempted from the notice requirements. *Id.* at 406. This Court upheld the notice provision, as so limited, because of the greater risk that an *immature* minor would be unable to give a truly informed consent to the abortion procedure. *Id.* at 411. As this Court noted in *Akron*, however, it is the unique status of such immature minors and their limited ability to make important decisions that provides states with a " 'significant' interest in certain abortion regulations aimed at protecting children 'that is not present in the case of an adult.' " *Akron*, 462 U.S. at 428-29 n.10, *quoting Danforth*, 428 at 75, and *citing Carey v. Population Services International*, 431 U.S. 678, 693 n.15. Despite this state interest, "the right to privacy in connection with decisions affecting reproduction extends to minors as well as adults." *Carey*, 431 U.S. at 692-93. Thus, the State bears the burden of demonstrating that any legislation inhibiting the privacy rights of minors is narrowly drawn to advance only the state's interest in assuring protection of the minor's best interests. *Id.* at 694-96.

Danforth, 428 U.S. 52, 74 (1976)("*Danforth*"). Even though a State's interest in protecting immature minors will justify imposition of a consent substitute, either parental or judicial, "the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Akron*, 462 U.S. at 439-40, *citing Bellotti*, 443 U.S. at 643-44. As this Court noted, these standards "are not in dispute." *Akron*, 462 U.S. at 439.

Disregarding *Akron*'s specific directives, appellants make two contentions in support of an exercise of this Court's jurisdiction. First, appellants argue that the existence of state statutes requiring parental involvement in a minor's abortion decision point to a need for "an authoritative ruling" on the constitutional adequacy of alternative procedures allowing parental involvement. Appellants also contend that a conflict exists between the United States Court of Appeals for the Seventh Circuit and this Court, and between the Seventh Circuit and other courts. (Juris. St. at 7-11.) In making their jurisdictional plea, appellants discount prior "authoritative rulings" by this Court, including *Danforth*, *Bellotti*, *Ashcroft*, and *Akron*, and mislead the Court as to both the scope and status of the parental consent or notification legislation enacted by other states.

Appellants list 26 states which have enacted statutes requiring some parental involvement in a minor's abortion decision. Appellants' list misses the point. Parental involvement in a minor's abortion decision, in general, is not at issue here. Two issues are presented for review: whether a mandatory 24-hour waiting period between actual notice and the abortion procedure is unconstitutional; and whether a judicial by-pass system that does not assure either anonymity or expedition is unconstitutional. Moreover, carefully buried in appellants' appendix, is their passing concession that at least 10 of the statutes they cite, or portions thereof, have been held

unconstitutional by courts applying precedents of this Court. Many of these cases invalidated provisions similar to those appellants seek to uphold here—a mandatory waiting period or an inadequate judicial by-pass mechanism.[6]

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[6] (1) Florida. Fla.Stat.Ann. § 458.505(4)(a) (Eff. July 1, 1979), *reprinted as* § 390.001(4)(a) (West Supp. 1985) written consent of parent held unconstitutional in *Jones v. Smith*, 474 F. Supp. 1160 (S.D. Fla. 1979) *aff'd sub nom. Scheinberg v. Smith*, 659 F.2d 476 (5th Cir. 981) *reh'g denied*, 667 F.2d 93 (1981); (2) Illinois. Ill. Rev. Stat. ch. 38, ¶ 81-61 *et seq.* (West Supp. 1984) 24-hour waiting period and inadequate judicial waiver procedures enjoined in *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985); (3) Kentucky. Ky. Rev. Stat. § 311.732 (1983) entire statutory scheme struck down, including parental consent provision, in *Eubank v. Collins*, 604 F. Supp. 141 (W. D. Ky (4) Maine, Me. Rev.Stat.Ann. ch. 22, § 1597 (1980) 24-hour advance notice to at least 1 parent of minor; no judicial by-pass held unconstitutional in *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542 (D. Maine 1979); (5) Nebraska. Neb.Rev.Stat. § 28-347 (1984 Supp.) (Eff. May 29, 1981) 24-hour advance notice to parents of minor held unconstitutional in *Orr v. Knowles*, No. CV81-0-301 (D. Neb. Sept. 19, 1983); (6) Nevada. Nev. Rev. Stat. § 442.255 (1981) amended by Act of June 14, 1985, ch. 681, 1985 Nev. Adv. Sheets 2306, 24-hour advance notice to at least 1 parent of pregnant minor permanently enjoined pursuant to consent decree entered on August 29, 1984 in *Glick v. Bryan*, CV-R-81-150-BRT (D. Nev. Aug. 29, 1984); judicial by-pass provision enjoined prior to effective date in *Glick v. McCay*, No. CV-R085-331-BCR (D. Nev. June 17, 1985); (7) Pennsylvania. 18 Pa. Cons. Stat. § 3206 (Purdon 1983), statutory provision requiring parental consent enjoined pending adoption by state Supreme Court of rules to implement judicial by-pass in *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d. 283 (3d Cir. 1984) *juris. postponed*, 105 S.Ct. 2015 (1985) (No. 84-495); (8) South Carolina. S.C. Code Ann. § 44-41-30 (1976) *reprinted as* § 44-41-30 (Law Co-op. 1985) provision requiring consent of parent and providing no judicial by-pass mechanism held unconstitutional in *Floyd v. Anders*, 440 F. Supp. 535 (D. S.C. 1977) *vacated and remanded on other grounds*, 440 U.S. 445, *rehearing denied*, 441 U.S. 928 (1979); (9) Tennessee, Tenn. Code Ann. § 39-302 (1978) *reprinted as* § 39-4-202

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Appellants fail to note at all that the Arkansas statute also has been declared unconstitutional because it lacked a judicial by-pass procedure[7] and that the mandatory waiting periods imposed by three additional statutes included in their legislative bibliography presently remain under preliminary injunctions or temporary restraining orders.[8] The Minnesota statute is in pending litigation, which challenges the constitutionality of that statute as it has been applied. *Hodgson v. Minnesota,* No. 3-81 C.V. 53-8 (D. Minn. 1981). Finally, although the constitutionality of the remaining 11 statutes catalogued by appellants have not been tested in litigation, nine of these laws

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(1982) enjoined as unconstitutional in *Planned Parenthood of Nashville v. Alexander,* No. 79-843-II (Tenn. Chancery Ct. Oct. 24, 1979); (10) Utah. Utah Code Ann. § 76-7-304 (1978) 24-hour waiting period after informed consent held unconstitutional in *Bagley v. Wilkinson,* No. C-81-603W (D. Utah Aug. 1981).

[7] Arkansas. Ark. Stat. § 41-2555 (1977) held unconstitutional in *Smith v. Bentley,* 493 F. Supp. 916 (E.D. Ark. 1980)(required parental consent for all minors; no judicial by-pass).

[8] (1) Arizona. Ariz. Rev. Stat. § 36-2152 (Supp. 1985) preliminarily enjoined in *Roe v. Corbin,* CIV 85-2118 PHX CLH (D. Ariz. Sept. 23, 1985) (24-hour advance notice to parent of minor); (2) Massachusetts. Mass. Gen. Laws Ann. ch. 112, § 12 (24-hour waiting period enjoined in *Planned Parenthood v. Bellotti,* 641 F.2d 1006, 1014-16 (1st Cir. 1981)); Missouri. Mo.Ann.Stat. § 188.028 (Vernon Supp. 1979) *reprinted as* § 188.028 (Vernon 1982)(mandatory notice provision held unconstitutional in *Planned Parenthood Ass'n of Kansas City v. Ashcroft,* 655 F.2d 848 (8th Cir. 1981); the state did not appeal this portion of the 8th Circuit's decision).

Appellants' claim in Appendix C that the Massachusetts and Missouri statutes "survived constitutional challenges" is somewhat misleading. As set forth above, the mandatory waiting period in both statutes was held unconstitutional. The "statute" upheld by this Court in *Ashcroft* did not include the waiting period, which had been declared unconstitutional by the Eighth Circuit and was not appealed by the state. *See Planned Parenthood Ass'n of Kansas City v. Ashcroft,* 655 F.2d 848, 866 (8th Cir. 1981) *aff'd in part, rev'd in part,* 462 U.S. 476 (1983).

clearly contravene this Court's holding in *Akron, Ashcroft, Bellotti* and *Danforth.*[9] Thus, of the 26 statutes cited by appellants, only two statutes, that of Indiana and Louisiana, appear consistent with the guidelines set forth by this Court.[10]

[9] (1) Alaska. Alaska Stat. § 18.16.010 (1981) (require parental consent to abortion for all unmarried minors; no judicial by-pass); (2) Delaware. Del. Code Ann. tit. 13, § 708 (1981) (no judicial by-pass); (3) Idaho. Idaho Code § 18-609 (Supp. 1985) (pursuant to a Legal Guidance Letter of the Idaho Attorney General (8/2/83) 24 hour waiting period after *consent* not enforced, waiting period after *notice* enforced); (4) Maryland. Md. Ann. Code § 20-103(1982)(requires notice to parent of minor; physician may not notify if notice in his judgment might lead to physical or emotional abuse of minor); (5) Montana. Mont. Code Ann. § 50-20-107 (1985)(written notice to parent of unmarried minor; no judicial by-pass); (6) North Dakota. N.D. Cent. Code § 14-02.1-03.1 (1985 Pocket Supp.)(judicial by-pass of parental consent requires mandatory notice to parents if court finds minor is immature); (7) Rhode Island. R.I. Gen. Laws § 23-4.7-6 (1985 Reenactment) (no provision for expedited appeal of adverse family court decision); (8) South Dakota. S.D. Codified Laws Ann. §§ 34-23A-7 (1977)(requires prior written consent of parent; no judicial by-pass); (9) West Virginia. W.Va. Code § 16-2F-3 (1984) (24-hour waiting period).

[10] Both of these statutes require the written consent of a parent but provide a constitutionally adequate judicial by-pass procedure. Ind. Code Ann. § 35-1-58.5-2.5 (1982) *amended and reprinted as* § 35-1-58.5-2.5 *Burns* Supp. 1985); La. Rev. Stat. Ann. § 1299.35.5 (West Supp. 1979), *amended and reprinted as* § 1299.35.5 (West Supp. 1980), *amended and reenacted* (West Supp. 1981), *reprinted as* § 1299.35.5 (West Supp. 1985). Both statutes were amended after earlier versions were declared unconstitutional and enjoined. *See, e.g., Planned Parenthood v. Pearson,* 716 F.2d 1127 (7th Cir. 1983) (48- and 24-hour waiting periods unconstitutional as was judicial by-pass procedure which did not provide for expedited appellate review, and provision which required automatic notice to parents upon denial of waiver petition); *Margaret S. v. Edwards,* No. 78-2765 (E.D. La. 1978) filed Aug. 1978; amended complaint filed Oct. 1980; second amended and supplemental complaint filed Aug. 1981, earlier version

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Many of the statutes appellants cite were adopted prior to this Court's leading decisions dealing with the rights of minors seeking abortions. As these statutes have been challenged, the lower courts have displayed no difficulty applying prior decisions of this Court. Moreover, many states appear to have followed this Court's guidance or that of the lower federal courts when enacting parental consent or notification legislation after 1983. Under these circumstances, an "authoritative ruling" repeating this Court's earlier decisions is unnecessary.[11]

Appellants' statutory compendium provides no stronger support for their argument that a mandatory waiting period is constitutional or that a conflict exists between the Seventh Circuit and this Court or the Seventh Circuit and the other circuits concerning the legitimacy of such a regulation. Appellants cite four statutes which mandate a waiting period. Appellants conveniently neglect to note, however, that of the four provisions they cite, one has been enjoined[12] and a second currently is subject to a constitutional challenge as applied.[13] The other two have not been challenged. In addition, in at least 6 other cases, state statutory provisions which imposed a mandatory waiting period between parental notification and

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of parental consent statute and mandatory waiting period held unconstitutional. *See* 488 F. Supp. 181 (E.D. La. 1981). Amended version held constitutional in *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984).

[11] *Thornburgh v. ACOG*, No. 84-495, presently pending before this Court, also involves a parental consent statute which the court of appeals declined to declare *per se* unconstitutional, choosing instead to defer a final ruling until the Pennsylvania Supreme Court promulgated rules governing judicial procedures for minors seeking waiver of the parental consent requirement. A decision in that case will provide any additional guidance deemed necessary by the State of Illinois.

[12] Ariz. Rev. Stat. § 36-2152 (Supp. 1985) preliminary injunction issued on Sept. 23, 1985 in *Roe v Corbin*, CIV 85-2118 PHX CLH (D. Ariz. 1985).

[13] *Hodgson v. Minnesota*, No. 3-81 CV 53-8 (D. Minn. 1981).

performance of the abortion have been held unconstitutional.[14] Moreover, two of these states, Louisiana and Indiana, amended their statutes, subsequent to judicial proceedings, to eliminate the unconstitutional waiting periods.[15]

The lower federal courts, including the Seventh Circuit, have correctly analyzed and applied the holdings of this Court, including *Ashcroft* and *Akron*, when evaluating the constitutionality of state statutes restricting a minor's effectuation of her fundamental right to choose to have an abortion. Appellants have shown no conflict between either the Seventh Circuit's analysis or its decision and the analysis and decisions of the other courts of appeal. Thus, appellants have failed to demonstrate the appropriateness of their request for the exercise of this Court's jurisdiction and their appeal should be dismissed.

Nor is there a conflict between the Seventh Circuit's application of the relevant constitutional principles and any decision of this Court. The Seventh Circuit, as explained below, correctly held that the waiting period required by § 4(a) was unconstitutional and that the skeletal judicial alternative to mandatory parental notice provided by § 5 did not comport with *Akron*, *Ashcroft*, or this Court's earlier decision in *Bellotti*. Thus, should a dismissal of this appeal prove inappropriate, the Seventh Circuit's decision should be affirmed.

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[14] See citations in note 6 to Maine, Nevada, Nebraska, Tennessee, Indiana, Utah and citation in note 8 to Massachusetts. *See also Zbaraz v. Hartigan*, 763 F.2d at 1536 (App. 6) for cases striking down waiting periods applied to adults and minors.

[15] See note 10, *supra*.

II.

A MANDATORY WAITING PERIOD FOLLOWING PARENTAL NOTIFICATION CONTRAVENES THIS COURT'S EXPRESS HOLDING IN *AKRON*.

A. This 24-Hour Delay In The Delivery Of Medical Services Imposes A Substantial, Unjustified Burden Upon A Minor Seeking An Abortion.

In *Akron*, this Court affirmed the Sixth Circuit's decision holding unconstitutional that portion of the *Akron* ordinance which prohibited a physician from performing an abortion until 24 hours after the woman had signed a consent form. *Akron*, 462 U.S. at 449-50. That inflexible waiting period had "no medical basis" and did not assure that "the abortion procedure would be performed more safely." *Id.* at 450. Moreover, because of scheduling difficulties, actual delay of the abortion procedure might be longer than 24 hours, with a consequent increase in not only the risk of the abortion but also the cost of the procedure as well. *Id.*

Appellees here submitted uncontroverted evidence that the Illinois Act's 24-hour waiting period would result in a substantial burden upon pregnant minors seeking to exercise their fundamental right to terminate an unwanted pregnancy. The waiting period mandated by the Act would "often result in delays exceeding 24 hours" because of scheduling and travel difficulties. (Markoff affidavit at ¶ 5.) This additional delay could result in increased "medical and emotional consequences" for pregnant minors, many of whom repress the knowledge of pregnancy and thus delay their decision to have an abortion until "well into the first trimester of their pregnancy, or even later." (Charles affidavit at ¶ 6, Osgood affidavit at ¶¶ 6, 7; Markoff affidavit at ¶ 5.)[16]

[16] The consequences of delay are well documented. Although early abortion is one of the safest medical procedures performed, for each week that the abortion is deferred, the medical risks associated with the procedure increase 30-50%. Hern, *Abortion Practice* 26 (1984).

Based on this evidence, the court of appeals affirmed the district court's holding that the 24-hour waiting provision was unconstitutional. Applying the analysis set forth in *Akron*, the court of appeals found that mandatory delay imposed an unconstitutional burden on minors. The exceptions to the mandatory waiting period, contained in § 7 of the Act, did not alleviate this burden. (App. 9, 763 F.2d at 1538-39.) One exception compromised the minor's privacy; another exception was likely to result in an even greater delay. (App. 9, 763 F.2d at 1538-39.)[17]

The court of appeals was not insensitive to the State's concern for promoting parental consultation to assure that the decision made was in the minor's best interests. This interest could be protected, ruled the court of appeals, with the notification requirement, alone, without the additional mandatory 24-hour delay after notification and consultation had occurred. (App. 8, 763 F.2d at 1537-38.) The court of appeals thus severed the unconstitutional 24-hour waiting period from the notice provision in § 4(a) and allowed the remainder of § 4(a) of the Parental Notice Act to stand. (App. 22, 763 F.2d at 1545.)

B. Appellants' Defense Of The Waiting Period Disregards *Akron* And Resurrects Arguments Consistently Rejected By This Court Since Its 1976 Decision In *Danforth*.

Appellants' focus on this Court's decision in *Ashcroft* is inapposite and provides no support for their argument that the 24-hour waiting period of § 4(a) is constitutional. Most obviously, *Ashcroft* did not adjudicate the constitutionality of a state-mandated waiting period after a woman's decision to have

[17] Minors seeking to submit notarized statements, in lieu of waiting, risk revealing to the notary their desire to have an abortion. Minors who would avoid the delay by having their parents accompany them to the clinic suffer a threefold increase in "[t]he problems of scheduling, travel, and expense . . . ." (App. 9, 763 F.2d at 1538-39.)

an abortion is made.[18] That issue was resolved in *Akron*, the companion case to *Ashcroft*. As discussed above, *Akron* struck down a 24-hour waiting period because, after a woman's consent is given, "a State may not demand that she delay the effectuation of that decision." 462 U.S. at 451.

Appellants argue that *Akron* is not controlling because this Court has never decided the constitutionality of a waiting period applied only to minors. (Juris. St. at 14.) That argument finds no support in either the *Akron* decision or any other decision by this Court. The statute held unconstitutional in *Akron* specifically imposed the 24-hour waiting period on all women, adult and minor.[19] Appellants can point to no language in the *Akron* opinion that would sustain, either explicitly or implicitly, a mandatory waiting period applied only to minors. Indeed, as recognized by the Seventh Circuit, those courts considering the constitutionality of a statutory waiting period have been nearly unanimous in striking down such

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[18] As recognized by the Seventh Circuit, the state in *Aschroft* did not appeal from the Eighth Circuit's decision holding unconstitutional that part of the Missouri statute which imposed a waiting period after parental consent was secured. (App. at 5, *citing* 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983)). The only other statute mandating parental involvement that has been upheld by the Court, other than the *Ashcroft* statute, did not require a waiting period after notification was effectuated. *See H.L. v. Matheson*, 450 U.S. 398, 409-10 (1981).

[19] As set forth by this Court in *Akron*, 462 U.S. at 424 n.7, Section 1807.7 of the *Akron* ordinance imposed the following restrictions:

> No physician shall perform or induce an abortion upon a pregnant woman until twenty-four hours have elapsed from the time the pregnant woman, and *one of her parents or legal guardians whose consent is required* in accordance with Section 1870.05(B) of this chapter, have signed the consent form required by Section 1870.06 of this chapter, and the physician so certifies in writing that such time has elapsed.

(Emphasis added.)

provisions, regardless of whether the statute regulated both adult and minor women or only minors. (App. at 5-6, 763 F.2d at 1536-37.)[20]

Lacking direct case support for their defense of a mandatory waiting period, appellants resort to two additional arguments that are facially plausible but substantively incorrect. They contend first that the court of appeals provided too much protection for the minor's fundamental right to terminate a pregnancy and, correspondingly, "incorrectly evaluated the interest of the parents." (Juris. St. at 14-18.) Appellants also argue that this Parental Notice Act, even with the 24-hour waiting period, is somehow less restrictive than the parental consent statute sustained in *Ashcroft* (Juris. St. at 13) and thus,

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[20] In arguing that minors are entitled to less constitutional protection than are adults, appellants attack the strict standard of scrutiny used by the court of appeals. The court of appeals required the state to prove that the Act, including the 24-hour waiting period, was "narrowly drawn to further a compelling interest." (App. at 16, 763 F.2d at 1537 (quotations omitted).) Appellants contend that this standard is appropriate only for adult women seeking abortions, not for minors seeking to exercise the same constitutional right. (Juris. St. at 16.) Appellants would replace this strict scrutiny with a rational basis standard that would allow the state latitude to regulate broadly so long as it could demonstrate a "significant . . . interest . . . that is not present in the case of an adult." (Juris. St. at 16, *citing Carey v. Population Services Internat'l*, 431 U.S. 678, 693 (1977) (plurality)). Thus, according to appellants, regulation of a minor's constitutional right need not be narrowly drawn.

Appellants' argument disregards classic constitutional theory as to the limitations on a state's authority to regulate or circumscribe fundamental rights. Regulations affecting fundamental rights may not be measured by a rational basis test. *Akron*, 462 U.S. at 420 n.1, and 427-30. Although appellants cited *Carey*, 431 U.S. 678 (1977), *Bellotti*, 443 U.S. 622 (1979), *Akron*, 462 U.S. 416 (1983), and *Ashcroft*, 462 U.S. 476 (1983) as approving a less stringent standard of scrutiny, none of these cases actually applied such a test. Moreover, the statutes in *Carey*, *Bellotti* and *Akron* were declared unconstitutional because insufficient protection was afforded minors' constitutional rights. See also discussion at note 1, *supra*.

by a negative implication, is constitutional. Neither contention has any credence.

1. The state's desire to support parental rights is not a constitutional justification for the 24-hour waiting period.

Appellants' first contention is based on a misconception of the scope of constitutional rights afforded minors. Constitutional rights do not mature and become operable only when a person reaches the age of majority. *See, e.g., Breed v. Jones,* 421 U.S. 519 (1975); *Tinker v. Des Moines School Dist.,* 393 U.S. 503 (1969). As this Court consistently has recognized in the abortion context, the constitutional rights of minors do not receive less protection than the rights of adults. *Danforth,* 429 U.S. at 74 (citations omitted).

The right to privacy includes the freedom to make important decisions independently. This Court, however, has held that states "have a legitimate interest in encouraging parental involvement in their minor children's decision to have an abortion" because of the fact that some "minors are less capable than adults of making such [an] important [decision]." *Akron,* 462 U.S. at 427-28 n.10. Nonetheless, state regulation affecting a minor's fundamental right to choose to have an abortion is constitutional only if it advances the *minor's* best interests. In short, the Constitution demands that "[S]tate and parental interests . . . give way to the constitutional right of a mature minor or an immature minor whose best interests are contrary to parental involvement" or to the constitutional right of a minor for whom the "abortion is in her best interest." *Akron,* 462 U.S. at 427-28 n.10.

Two of the three statutory purposes Illinois advances as justification for the Act do not meet this constitutional mandate. The Act seeks to "[foster] the family structure and [preserve] it as a viable social unit," and to "[protect] the rights of parents to rear children who are members of the household," often at

the expense of the minor's need for an abortion without the medically unnecessary delay mandated by § 4(a) of the Act. As found by the court of appeals, the state's legitimate interest in providing assistance to a minor making the abortion decision is served by a parental notice provision, in itself. (App. at 8, 763 F.2d at 1537-38.) The additional burden imposed upon the minor by the mandatory 24-hour waiting period cannot be justified by any legitimate state interest.

Indeed, in *Danforth,* this Court rejected an analogous attempt by the State of Missouri to support its parental consent statute, noting:

> It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure.

428 U.S. at 75.[21]

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[21] Uncontroverted evidence submitted to the district court established that the Act's notice provision had the same impact on minors as a consent provision has been found to have. *See Bellotti,* 443 U.S. at 631. As Dr. Zbaraz stated:

> Some of my minor patients are accompanied by one or both parents when I conduct pre-abortion examinations and consultations. However, others of my minor patients ask me if their parents have to be told about their pregnancy and their intent to terminate it. Some of these minors are sufficiently mature to make the abortion decision in consultation with me independently. Others express such fear of parental reaction that I have concluded that it may not be in their best interests to notify their parents. Therefore, mandatory notice to both parents or to a legal guardian, when against the wishes of my patients, destroys the privacy

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2. This "notice" statute is more restrictive than the parental consent provision sustained in *Ashcroft*.

Appellants' contention that the consent provision of the statute upheld in *Ashcroft* was more restrictive than the notice provision and waiting period involved here is supported by neither any factual evidence nor any analysis. Rather, the argument is based on appellants' misconception that notice is less restrictive than consent because the Act's notice provision, even with the 24-hour delay, does not "impose a parental veto." The *Ashcroft* consent provision is *more* restrictive, according to appellants, because it could "result in substantial delays and even preclude the minor from having the abortion altogether." (Juris. St. at 13.) Appellants' argument displays their misunderstanding of the Court's explicit directive, as first enunciated in *Danforth*, that neither the state nor parents can impose an absolute veto of a minor's desire to have an abortion. *Akron*, 462 U.S. at 439-440.

The Seventh Circuit correctly has recognized that notice is the functional equivalent of consent because "young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to the courts." *Planned Parenthood v. Pearson*, 716 F.2d at 1132, *quoting Bellotti*, 443 U.S. at 647. The State's legitimate interest in ensuring parental consultation to assure the minor's best interests is satisfied once notice to a minor's parents is effectuated. (App. 8, 763 F.2d at 1537-38.) Given the uncontroverted evidence of the burden that the waiting period imposes upon pregnant minors, as found by both lower courts, appellants' alternative argument also fails to provide a constitutional justification for the waiting period.

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> and confidentiality of the physician-patient relationship, destroys the patient's trust in me, is against the medical interest of some of my patients, and causes harmful stress.

Zbaraz affidavit at ¶3.

III.

THE ACT'S JUDICIAL ALTERNATIVE TO PARENTAL NOTIFICATION DOES NOT ASSURE EITHER AN EXPEDITIOUS OR ANONYMOUS PROCEEDING; THUS, THE COURT OF APPEALS CORRECTLY ENJOINED ITS ENFORCEMENT PENDING PROMULGATION OF THE ILLINOIS SUPREME COURT RULES ANTICIPATED, AND REQUESTED, BY THE ILLINOIS GENERAL ASSEMBLY.

Again, the relevant legal standards have long been established. In *Ashcroft*, this Court re-affirmed *Bellotti* and held that any alternative to parental involvement "must 'assure' that the resolution of [the minor's request for an abortion] 'will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.'" *Ashcroft*, 462 U.S. at 491 n.16, *quoting Bellotti*, 443 U.S. at 644. Consistent with these standards, the court of appeals enjoined enforcement of the Illinois Parental Notice Act until such time as the Illinois Supreme Court promulgates rules to establish a judicial process that would be both expeditious and protective of the minor's constitutional right of anonymity.

Appellees' challenge to the judicial by-pass procedures of the Parental Notice Act focused primarily on the inadequacies of the appeal process. Barred by Article VI, § 16 of the Illinois Constitution from legislating judicial procedure, the General Assembly in § 5(g) requested the Illinois Supreme Court to promulgate rules assuring anonymous and expeditious judicial proceedings.[22] Sections 5(f) and (g) provide:

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[22] Appellants' argument that Art. VI, § 16 of the Illinois Constitution limits the General Assembly to only requesting that rules be promulgated to expedite appeals is irrelevant to the constitutional scrutiny required of any statute regulating fundamental rights. To the extent the General Assembly is foreclosed from legislatively enacting the specific rules mandated by the United States Constitution, it could have conditioned the effective date of the notification requirement upon the promulgation of such rules by the Illinois Supreme Court.

> (f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.
>
> (g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

The Act itself sets no specific time limits for the appellate process[23] and, further, does not establish any procedure to preserve the minor's anonymity. Two years after the enactment of these provisions, the Illinois Supreme Court has yet to promulgate any rules.

The court of appeals correctly ruled that a request for appellate rules, which was not legally binding on the Illinois Supreme Court, did not provide the "framework for a constitutionally sufficient means of expediting judicial proceedings" required by *Ashcroft*. (App. 14, 763 F.2d at 1541.) Because time is of the essence in an abortion decision, the court of appeals found that the absence of rules setting judicial deadlines was a fundamental defect in § 5. Thus, the court of appeals enjoined this section until the Illinois Supreme Court enacts the necessary rules. (App. 14, 763 F.2d at 1541.)[24]

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[23] The Act does set a specific time limit for circuit court proceedings, which are the courts of general jurisdiction in which the minor must file her waiver petition. Section 5(c) provides that a petition for waiver of parental notice "shall be given precedence over other pending matters" and that "in no case shall the [circuit] court fail to rule within 48 hours of the time of application . . . ."

[24] *See also American College of Obstetricians and Gynecologists v. Thornburgh*, 673 F.2d 283, 297 (3d Cir. 1984), *juris. postponed*, 105 S.Ct. 2015 (1985) (Pennsylvania parental consent statute enjoined pending promulgation by the Pennsylvania Supreme Court of rules assuring anonymity and expedition). The Pennsylvania Supreme Court promulgated certain rules governing judicial proceedings in November 1984, after the appeal to this Court was docketed. (Brief

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By way of contrast, the Missouri statute sustained in *Ashcroft* set forth very specific deadlines for the appellate procedures. Section 188.028 of the Missouri law required that notice of appeal be given within 24 hours and that the record be completed and the appeal perfected within 5 days. *Ashcroft*, 462 U.S. at 491 n.16, *citing* Mo. Rev. Stat. § 188.028.2 (6) (Supp. 1982). Thus, appellants misplace their reliance upon *Ashcroft* to support the judicial procedures requested by the Illinois Act, but as of yet non-existent. Appellants' argument that § 5 of the Act is similar to the Missouri statute and therefore is constitutional disregards the explicit terms of that law, and ignores the absence of such explicit terms in the Illinois Parental Notice Act and the absence of any supplemental court rules specifically protecting the constitutional rights of minors seeking waiver of § 4 of the Act.

Appellants' alternative argument—that existing general rules of Illinois appellate procedure supply the framework lacking in § 5 of the Act—is equally unpersuasive. Illinois Supreme Court Rules 303 and 311 do not establish precise time frames for a minor seeking relief from the circuit court's denial of her petition to have an abortion without providing parental notice. Although an appeal under these rules may be docketed within five days, a minor must specifically ask to place her petition on the accelerated docket and then file another separate request with the appellate court asking for an expedited hearing. Rule 311 does not mandate the expedited hearing but

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for Appellees in *Thornburgh v. American College of Obstetricians and Gynecologists*, No. 84-495, at 44.)

In the two years since the Act was passed, the Illinois Supreme Court has not promulgated any rules governing appeals pursuant to § 5 of the Parental Notice Act. Appellants' claim that there has been "no need" for the Illinois Supreme Court to act (Juris. St. at 21) is not credible, given the court of appeals' precise directive that the Act would be enjoined only until the Illinois Court promulgated the necessary rules.

merely grants the reviewing court discretion to hold such a hearing. (App. 15, 763 F.2d at 1541.) Thus, these general rules, which do not even mention abortion, are very similar to the general court rules found by this Court in *Akron* to be inadequate to assure a meaningful alternative to a minor seeking a waiver of a parental consent requirement. *See Akron*, 462 U.S. at 440-41.

The constitutional inadequacy of § 5, without the requested supplemental rules, is further highlighted by the absence of any specific provisions to assure the minor's anonymity at either the circuit court hearing or on appeal. In stark contrast, the Missouri statute specifically directed that a minor file a waiver petition using only her initials. As found by the court of appeals, additional problems involving the minor's anonymity exist not only during the course of a proceeding, but afterwards, given the public availability of court documents and files in Illinois. (App. 19, 763 F.2d at 1543.) Despite the request by the General Assembly that rules be promulgated, the Illinois Supreme Court has yet to act. As a consequence, yet another dimension of the Illinois Act continues to fall short of the standards set forth in *Ashcroft* and *Bellotti*.

Recognizing this Court's willingness in *Ashcroft* to allow the state supreme court to promulgate constitutional rules before striking down a statute, and this Court's directive to "construe a statute to avoid any danger of unconstitutionality," the court of appeals declined to declare the entire Act unconstitutional. Instead, the court of appeals continued the injunction and deferred a conclusive ruling on the constitutionality of the Act until such time as the Illinois Supreme Court has promulgated the necessary rules. The nature of the court of appeals' decision and its remand of this case to the district court make it unnecessary for this court to afford appellants a plenary review at this time.

CONCLUSION

This appeal should be dismissed because appellants present no substantial federal questions which require review by this Court. Alternatively, the judgment below should be summarily affirmed because the Seventh Circuit's decision that the 24-hour waiting period is unconstitutional and that the judicial by-pass procedures, absent supplemental court rules, are inadequate, comports with prior decisions of this Court.

Respectfully submitted,

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No. 85-673 (4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

NEIL HARTIGAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS

APPELLANT

v.

DAVID ZBARAZ, M.D.

APPELLEE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

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MOTION TO ALLOW COUNSEL TO REPRESENT CHILDREN UNBORN AND BORN ALIVE

The Court is moved to allow Alan Ernest to represent the victims being killed by Roe v. Wade, 410 U.S. 113, as counsel or guardian ad litem, for the purpose of defending their right to life under the U.S. Constitution.

INTEREST OF COUNSEL

Alan Ernest is a lawyer in the District of Columbia and a member of the bar of this Court. His purpose is to show that Roe v. Wade is not valid law, and to prove that the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn. The parties have not done this.

This is effectively a motion to allow retained counsel to represent the victims being killed, since there will be no expense to this Court, or to the taxpayers.

APPEARANCE AT ORAL ARGUMENT AND LEGAL BRIEF

The Court is moved to allow counsel for the unborn to appear at oral argument, and to set aside sufficient time to attack the validity of Roe v. Wade, and to prove that the universal words "any person," as used in the U.S. Constitution, do include the unborn.

The court is moved to allow counsel to file a brief to support his oral argument.

SUMMARY OF ARGUMENT

The reasons that the unborn have a constitutional right to be especially represented by counsel in these proceedings, along with the issues raised about the validity of Roe v. Wade, are adequately summarized in the Table of Contents, supra. The overruling of Roe v. Wade disposes of all issues raised by the parties.

Argument

THE UNBORN HAVE A CONSTITUTIONAL RIGHT TO BE ESPECIALLY REPRESENTED BY COUNSEL IN THIS PROCEEDING TO DEFEND THEIR RIGHT TO LIFE BECAUSE:

1.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW COUNSEL TO REPRESENT THE UNBORN AND DEFEND THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

Counsel did not especially represent the unborn in the U.S. District Court, or at any stage in Roe v. Wade. An original party objected that the unborn should be represented by counsel in this Court:

> (T)he Court should have every benefit of a complete record and the representation of a guardian ad litem for that fetal entity and for its natural right to develop to birth.[1/]

But this Court refused to allow counsel to represent the unborn. Thus the killings commenced.

And the Supreme Court has maintained the killings by refusing to allow counsel

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1./ Petition for Rehearing 5, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

to represent the unborn, and attack the validity of Roe v. Wade, and defend their right to life under the Constitution.[2/]

2./ This Court has refused to allow counsel to represent the unborn in all the major abortion cases since 1973. Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel represent the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel represent the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel represent the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel represent the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel represent the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel represent the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel represent the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel represent the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel represent the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel represent the unborn denied 458 U.S. 1104; Diamond v. Charles, __ U.S. __, 90 L Ed 2d 48 (1986), motion to allow counsel represent the unborn denied 87 L Ed 2d 704; Thornburgh v. American College of Obstetricians and Gynecologists, __ U.S.__, 90 L Ed 2d 779 (1986), motion to allow counsel represent the unborn denied 87 L Ed 2d 702-703.

The unborn have a constitutional right to be represented by counsel to defend their right to life under the U.S. Constitution.[3/] This denial in prior cases makes Roe v. Wade void.

3./ If the Constitution would not permit a court to condemn even one Jew to death in a criminal case after it had refused to allow assistance by counsel, then could the Constitution permit a Court to condemn all Jews in the United States to death without counsel, as was done in Roe v. Wade?

The right to counsel is not limited to criminal cases. In Re Gault, 387 U.S. 1 (1967). Even in non-judicial, civil cases, before a mother can be deprived of welfare, she has a constitutional right to be assisted by counsel of her choice. Goldberg v. Kelly, 397 U.S. 254 (1970). Then could the Constitution permit a court to decree that the mother's life is not protected by the U.S. Constitution and she can be killed with impunity from criminal statutes, after denying her assistance of counsel? Although this is plainly lawless, this Court used this process against the unborn. But changing the names of the victims will not change the legal result.

The unborn not only have a right to be represented by counsel in this case, but the denial of this right in prior cases makes Roe v. Wade void.

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW PRIOR NOTICE OF THE CONSTITUTIONAL STANDARDS OR THE EVIDENCE WHICH IT USED TO INFER THAT THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

The District Court in Roe v. Wade did not even look to see if the lives of the unborn were protected by the U.S. Constitution. This question was argued for the first time after the case reached this Court. Since this Court had never previously excluded anyone from the protection of the U.S. Constitution so they could be killed with impunity from criminal statutes, the parties had no prior notice of the factual and legal bases for such an exclusion. And in Roe v. Wade this Court gave the parties no prior notice of the constitutional standards, burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were

already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn:

> (N)ot only did the Court set a new constitutional standard, but at the same moment the Court applied the standard without giving the Appellees notice or opportunity to present evidence with respect to the point in gestation at which such standards, if they be correct as a matter of law in the first place, should be applied. "Viability", "meaningful life" or existence, "fetal life": all presumably have medical meaning which should be subject to medical testimony before a decision of constitutional import becomes solidified in concrete. These concepts are not even necessarily the appropriate ones.[4/]

But this Court refused to allow the original parties to have prior notice. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn had no prior notice in Roe v. Wade of the factual and legal basis needed

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4./ Petition for Rehearing 6, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973). (emphasis added).

to defend the unborn's right to life under the U.S. Constitution.[5/]

The unborn have a constitutional right to prior notice of all the factual and legal bases before they can be excluded from the protection of the U.S. Constitution so they can be killed with impunity from criminal statutes.[6/] This denial makes Roe v. Wade void.

5./ See cases in note 2, supra.

6./ If the Constitution would not permit a court to condemn even one Jew to death in a criminal case after it had refused to allow prior notice of all the factual and legal bases, then could the Constitution permit a Court to condemn all Jews in the United States to death without prior notice, as was done in Roe v. Wade?

The right to prior notice is not limited to criminal cases. In Re Gault, 387 U.S. 1 (1967). Even in non-judicial, civil cases, before a mother can be deprived of welfare, she has a constitutional right to have prior notice of the factual and legal bases for the adverse action. Goldberg v. Kelly, 397 U.S. 254 (1970). Then could the Constitution permit a court to decree that the mother's life is not protected by the U.S. Constitution and she can be killed with impunity from criminal statutes, without prior notice of the factual and legal bases? Although this is plainly lawless, this Court used this process against the unborn. But changing the names

THIS COURT EFFECTED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY USING A SECRET EVIDENTIARY PROCESS TO FIND EVIDENCE TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION.

This Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. The Court conducted these evidentiary proceedings in its back rooms; the parties were not allowed to be present; no public record was made of these proceedings. The purpose of these proceedings was to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected to these secret judicial proceedings:

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of the victims will not change the legal result.

The unborn not only have a right to defend their right to life with prior notice in this case, but this denial in prior cases makes Roe v. Wade void.

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation for the Court's opinion ... of constitutional stages of fetal growth.[7]

But the Court permitted the killings to commence despite this objection to its secret evidentiary proceedings.

And this Court has maintained the killings despite repeated objections that it used secret evidentiary proceeding in Roe v. Wade.[8]

The unborn have a constitutional right not to be excluded from the protection of the U.S. Constitution by secret evidentiary

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7. Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

8. See cases in note 2, supra.

proceedings.[9/] This denial makes Roe v. Wade void.

4.

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW ITS EVIDENCE, WHICH IT USED TO INFER THAT THE LIVES OF THE UNBORN ARE NOT PROTECTED BY THE U.S. CONSTITUTION, TO BE CONFRONTED AND CROSS-EXAMINED.

Since the Court used a secret process, the original parties had not seen all the

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9./ If the Constitution would not permit a court to condemn even one Jew to death in a criminal case after it had used secret evidentiary proceedings, then could the Constitution permit a Court to condemn all Jews in the United States to death with secret proceedings, as was done in Roe v. Wade?

The prohibition against secret proceedings is not limited to criminal cases. In Re Gault, 387 U.S. 1 (1967). Even in non-judicial, civil cases, the constitution will not permit a mother to be deprived of welfare by secret proceedings. Goldberg v. Kelly, 397 U.S. 254 (1970). Then could the Constitution permit a court to decree that the mother's life is not protected by the U.S. Constitution and she can be killed with impunity from criminal statutes, by secret proceedings? Although this is plainly lawless, this Court used this process against the unborn. But changing the names of the victims will not change the legal result.

The unborn not only have a right to open proceedings to defend their right to life in this case, but this denial in prior cases makes Roe v. Wade void.

evidence which the Court used to infer that the lives of the unborn are not protected by the U.S. Constitution. An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution:

> The Court has taken judicial notice of innumerable facts and factors, some which are expressly referred to in the Court's decision and some which are unknown to the parties but which apparently were extricated from various sources by the Court's diligent research, which facts nevertheless should be subject to refutation and counter-evidence since they form the foundation of the Court's opinion .... of constitutional stages of fetal growth.10/

But the Supreme Court refused to allow the original parties to cross-examine its evidence in Roe v. Wade, which it used to infer that their lives were not protected by the U.S. Constitution. Thus the killings commenced.

10./ Petition for Rehearing 4, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973) (emphasis added).

And this Court has maintained the killings despite repeated objections that the unborn have never had opportunity to cross-examine the evidence which this Court used to infer that their lives were not protected by the U.S. Constitution.[11/]

The unborn have a constitutional right to confront and cross-examine the evidence which this Court used to infer that their lives are not protected by the U.S. Constitution.[12/] This denial makes Roe v. Wade void.

11./ See cases in note 2, supra.

12./ If the Constitution would not permit a court to condemn even one Jew to death in a criminal case after it had refused to allow cross-examination of the adverse evidence, then could the Constitution permit a Court to condemn all Jews in the United States to death without opportunity to confront and cross-examine, as was done in Roe v. Wade?

The right to confront and cross-examine adverse evidence is not limited to criminal cases. In Re Gault, 387 U.S. 1 (1967). Even in non-judicial, civil cases, before a mother can be deprived of welfare, she has a constitutional right to confront and cross-examine adverse evidence. Goldberg v. Kelly, 397 U.S. 254 (1970). Then could the Constitution permit a court decree that the mother's life is not protected by the U.S. Constitution and

THIS COURT EFFECTED AND MAINTAINED THE ROE v. WADE KILLINGS BY UNCONSTITUTIONALLY REFUSING TO ALLOW EVIDENCE TO BE PRESENTED ON BEHALF OF THE UNBORN TO ESTABLISH THEIR RIGHT TO LIFE UNDER THE U.S. CONSTITUTION.

In Roe v. Wade, the Court invented new constitutional standards on the protection of life by the U.S. Constitution. The parties had never had opportunity to present evidence under these new standards. An original party asked permission to present evidence under the new constitutional standards, which it had not seen before, to show that the lives of the unborn are protected by the Constitution:

> We are dealing here with a procedure long considered outlawed and which has suddenly become become legal.
> ....

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she can be killed with impunity from criminal statutes, after refusing to allow her to confront and cross-examine the adverse evidence? Although this is plainly lawless, this Court used this process against the unborn. But changing the names of the victims will not change the legal result.

The unborn not only have a right to confront and cross-examine the adverse evidence in Roe v. Wade, but this denial in prior cases makes Roe v. Wade void.

....
What the Court has done is to compel the State to condone the killings of prenatal infants and even to encourage it by loose controls.
....
The interest in protecting the concept of the sacredness of human life and the natural rights which follow its emergence, underlies the interest in protecting fetal life and is the root of the State's expressed desire to curb killing.
....
The Court has selected a point in time at which states may protect fetal life, without any record of facts upon which to base the conclusion that only at "viability," as that term is defined by the Court, do the people of a state have authority to demand caution before a prenatal infant is destroyed.
....
Appellees have had no opportunity to show by evidence in a traditional judicial trial setting at what gestational stage the separate life of the fetus is "meaningful" medically; in addition, the Court overlooked the significance of Georgia's legal recognition of meaningful human life as found in case law and statute.
....
With no opportunity for Appellees to demonstrate the factual basis, in terms of current medical science, that its interest attaches at a particular point in the natural development of a human fetus, the Court has seized upon the convenient point of "viability" and crystallized constitutional command which bars State action.

....
The Court's phrase "potential human life" should also be subject to medical scrutiny if it is to have judicial meaning in medical spheres. In the medical concept of "life," with its current body of technological knowledge, including such advances as fetal electrocardiography and fetal electroencephalography, legal "life" should not be cemented at an event in a judicial conclusion which does not have the benefit of medical evidence.
....
At any rate, Appellees should have an opportunity to present evidence and testimony to support the State's claim of medically and scientifically sound interest in requiring a cautious approach to the extinguishment of fetal life.13/

But the Court refused to allow the original parties to present evidence to show that the lives of the unborn were protected by the U.S. Constitution. Thus the killings commenced.

And this Court has maintained the killings despite repeated objections that the unborn are being deprived of the right to present evidence to prove that their

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13./ Petition for Rehearing 3,4,5,6,8, Doe v. Bolton, 410 U.S. 179 (1973), denied 410 U.S. 959 (1973).

lives are protected by the U.S. Constitution.[14]/

The unborn have a constitutional right to present evidence in this case to prove that their lives are protected by the U.S. Constitution.[15]/ This denial in prior cases makes Roe v. Wade void.

14./ See cases in note 2, supra.

15./ If the Constitution would not permit a court to condemn even one Jew to death in a criminal case after it had refused to allow him to present evidence, then could the Constitution permit a Court to condemn all Jews in the United States to death without opportunity to present evidence, as was done in Roe v. Wade?

The right to present evidence is not limited to criminal cases. In Re Gault, 387 U.S. 1 (1967). Even in non-judicial, civil cases, before a mother can be deprived of welfare, she has a constitutional right to present evidence. Goldberg v. Kelly, 397 U.S. 254 (1970). Then could the Constitution permit a court to decree that the mother's life is not protected by the U.S. Constitution and she can be killed with impunity from criminal statutes, after refusing to allow her to present evidence? Although this is plainly lawless, this Court used this process against the unborn. But changing the names of the victims will not change the legal result.

The unborn have a right to present evidence to prove that their lives are protected by the Constitution. The denial in prior cases makes Roe v. Wade void.

The procedures used by the Court to effect and maintain the Roe v. Wade killings are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of complicity in extermination and murder.[16/]

Having decreed "MASS MURDER IS LIBERTY," the Court now maintains its killings by conspiring to keep truth from working in its Court by using its "iron curtain" procedures.

16./ "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel....(T)he accused learned only a few moments before trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them." United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1046-1047 (1951). "Such a mock trial is not a judicial proceeding but a murder." Id., at 1164. "The dagger of the assassin was concealed beneath the robe of the jurist." Id. at 985.

ISSUES RAISED BY COUNSEL FOR THE UNBORN NOT RAISED BY THE PARTIES

The parties have neither challenged the validity of Roe v. Wade, nor defended the right to life of the unborn under the U.S. Constitution. Counsel for the unborn presents the following issues not presented by the parties:

1.

ROE v. WADE IS VOID, BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH HAD BEEN DEMOCRATICALLY DEFINED TO BE "MURDER," AND THUS DECREED "MASS MURDER IS LIBERTY." THIS IS THE ULTIMATE LAWLESS JUDICIAL ACT.

This evidence is presented in the amicus curiae brief by the Legal Defense Fund for Unborn Children filed in this case, which is incorporated herein by reference.

2.

ROE v. WADE IS VOID BECAUSE THIS COURT USED FALSE EVIDENCE, AND UNCONSTITUTIONAL BURDENS OF PROOF, TO INFER THAT "THE WORD 'PERSON,' AS USED IN THE FOURTEENTH AMENDMENT, DOES NOT INCLUDE THE UNBORN." THE UNIVERSAL WORDS "ANY PERSON," AS USED IN THE CONSTITUTION, DO INCLUDE THE UNBORN.

This evidence is presented in the amicus curiae brief by the Legal Defense

Fund for Unborn Children filed in this case, which is incorporated herein by reference.

3.

ROE v. WADE IS VOID BECAUSE THIS COURT USED UNCONSTITUTIONAL PROCEDURES TO EFFECT AND MAINTAIN THE ROE v. WADE KILLINGS.

This evidence is presented herein, supra pages 3-18.

CONCLUSION

The photograph on the next page shows a child killed by a second stage abortion by prostaglandin performed pursuant to Roe v. Wade. Such abortions not uncommonly result in the child being born alive.1 The U.S. Supreme Court decreed such killings to be "liberty." Yet, the American people had defined such killings to be "murder." In plainest terms,

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1./ Floyd v. Anders, 440 F. Supp. 535, 538 (1977). There are about 140,000 second stage abortions each year. All the common second stage abortion techniques - hysterotomy, prostaglandin, and even salt poisoning - can result in the child being born alive. Jefferies and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.

the Supreme Court of the United States has decreed: "MASS MURDER IS LIBERTY."



These children are entitled to assistance of counsel in these proceedings to prove that their lives are protected by the Constitution and laws of the United States.

Alan Ernest

Counsel for Movant

AMICUS CURIAE

BRIEF

MOTION FILED
NOV 22 1986

No. 85-673

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

NEIL HARTIGAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS

APPELLANT

v.

DAVID ZBARAZ, M.D.

APPELLEE

ON APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF WITH BRIEF BY LEGAL DEFENSE FUND FOR UNBORN CHILDREN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

The Court is moved for leave to file the attached brief amicus curiae by the Legal Defense Fund for Unborn Children.

Their interest is to defend the constitutional right to life of the unborn which the parties have not done. The amicus brief does not support either party.

The amicus demonstrates that Roe v. Wade, 410 U.S. 113 (1973), is a mistake of law. The reasons are adequately summarized in the brief's table of contents.

The parties have not challenged the validity of Roe v. Wade. The overruling of Roe v. Wade disposes of all the issues raised by the parties.

Alan Ernest
Counsel

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1986

NEIL HARTIGAN

v.

DAVID ZBARAZ, M.D.

AMICUS CURIAE BRIEF BY THE LEGAL DEFENSE FUND FOR UNBORN CHILDREN

INTEREST OF AMICUS CURIAE

The interest of the Legal Defense Fund For Unborn Children is to attack the validity of Roe v. Wade, 410 U.S. 113 (1973), and to prove that the universal words "any person," as used in the Fifth and Fourteenth Amendments, do include the unborn. The parties have not done this. This brief does not support either party.

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973), is unconstitutional and void.

In Roe v. Wade, this Court decreed: "MASS MURDER IS LIBERTY." This is the

ultimate lawless act. In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan, "FREEDOM IS SLAVERY." Although this science fiction may appear improbable, the Supreme Court has defrauded this nation into obedience with the ultimate fraud, "MASS MURDER IS LIBERTY."

The other reasons that Roe v. Wade is void are adequately summarized in the Table of Contents, supra.

The evidence shows that the universal words "any person," as used in the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, do include the unborn.

Due process of law has compelled this court to overrule Roe v. Wade by implication, and now this Court must expressly overrule it. This disposes of all the issues raised by the parties.

ARGUMENT

I.
ROE v. WADE IS VOID, BECAUSE THIS COURT DECREED KILLINGS TO BE "LIBERTY" WHICH HAD BEEN DEMOCRATICALLY DEFINED TO BE "MURDER," AND THUS DECREED "MASS MURDER IS LIBERTY." "THE SUPREME JUDGE" OF NAZI GERMANY ALSO DECREED MASS MURDER TO BE LEGAL.

In Roe v. Wade, 410 U.S. 113, this Court decreed deliberate killings to be "liberty" which had been defined by statutory law to be "murder" since long before adoption of the Fourteenth Amendment.[1]

1./ When the Fourteenth Amendment was adopted, an abortion was murder if the child was "born alive." And a child could be "born alive" long before viability.

A. The English Common Law

The English common law, as stated in the works of Coke, (3 Inst. 50), Hawkins, (1 Hawkins Ch. 13, s. 16) and Blackstone, (4 Bl. Com. 198) defined an abortion, in which a "quick" child died after being "born alive," to be "murder."

Thus, under the common law, an abortion of an unviable child, a child too immature to survive outside the womb, who died after being born alive, was "so horrible an offense" and "this is murder." 3 Inst. 50.

Regina v. West, 2 C & K 784 (1848) followed Coke, Hawkins, and Blackstone, and ruled that an abortion was murder if the child

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In 1857, the American Medical Association began a two year study of all the abortion laws in the United States. The 1859 report stated the law of murder throughout the United States, as follows:

> "If a person, intending to procure abortion, does an act which causes the child to be born earlier than its natural time, and therefore in a state much less capable of living, and it afterwards die in consequence of such premature exposure, the person who by this misconduct brings the child into the world, and puts it in a situation in which it cannot live, is guilty of murder." Reported in A.S. Taylor, infra, at 462. (emphasis added)

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was born alive, even though the child died because it was too immature to survive outside the womb.

The indictment for murder alleged that the defendant had inserted a "certain pin ... upward into the womb" of a pregnant woman for the purpose of producing the abortion of a "quick" child; and that this resulted in the child being "prematurely born and brought forth alive from and out of the womb." Regina v. West, 2 C & K at 784-85. The child died shortly afterward. A "medical witness" had testified:

"[I]t was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any

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Yet, in 1973, this is the very killing which the U.S. Supreme Court decreed to be "liberty."

In plainest terms, the U.S. Supreme Court decreed: "MASS MURDER IS LIBERTY."

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considerable length of time separated from the womb of the mother. It was incapable of maintaining a separate and independent existence." Regina v. West, 2 C & K at 786.

The judge, relying on Coke and Blackstone, instructed the jury that if the child were "born alive," the abortion was murder, even though the child were not viable:

"The prisoner is charged with murder; and the means stated are, that the prisoner caused the premature delivery of the witness Hensen, by using some instrument for the purpose of procuring abortion; and that the child so prematurely born was, in consequence of its premature birth, so weak that it died.... I am of opinion (and I direct you in point of law), that if a person intending to procure abortion does an act which causes the child to be born so much earlier than the natural time, that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder." Regina v. West, 2 C & K at 788.

The case of Regina v. West, supra, was

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Many people would be astonished to learn that this case for the unborn is the same case they would have to present for themselves if their own right to life were challenged in a federal court.

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cited by the leading English writers as the correct statement of the law of murder. See, 1 J.F. Archbold, A Complete Treatise on Criminal Procedure, Pleading and Evidence 783 (Waterman Am. ed. 7th ed. 1860); 1 W.O. Russell, A Treatise on Crimes and Misdemeanors 671-672 (4th ed. 1865); A.S. Taylor, A Manual of Medical Jurisprudence 516 (Penrose Am. ed. 6th ed. 1866). An abortion which resulted in an unviable child being born alive was murder.

B. THE AMERICAN LAW OF MURDER IN 1868

The common law is the dictionary for the state and federal homicide statutes; American courts used it to construe the meaning of their murder statutes. Hamilton v. United States, 26 App. D.C. 382 (1905); Clarke v. State, 117 Ala. 1 (1898).

By the time the Fourteenth Amendment was adopted in 1868, American legal authorities had specifically cited Regina v. West, supra, as the correct statement of the law of murder. As Wharton explained the law, A Treatise on the Law of Homicide in the United States 93 (1855):

"If a person intending to procure abortion, does an act which causes a child to be born so much earlier than the natural time, that it is born in a state much less capable of

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For example, take almost any group of persons, such as the insane, or invalids, or Jews. Suppose it were claimed in federal court that it is "liberty" to deliberately kill members of these groups, as well as the unborn.

What factual, non-argumentative evidence

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living, and afterwards dies, in consequence of its exposure to the external world, the person who by this misconduct, so brings the child into the world, and puts it thereby in a situation in which it cannot live, is guilty of murder."

American authorities agreed that this was the correct statement of the law of murder. 2 J.P. Bishop, Commentaries on the Criminal Law 365 (4th ed. 1868); A.S. Taylor, Manual of Medical Jurisprudence 462, 517 (Penrose Am. ed. 6th ed. 1866). This was the uncontradicted view in the United States when the Fourteenth Amendment was adopted.

This was the law from the time of the first settlement at Jamestown to when Roe v. Wade was decided. R. Perkins, Criminal Law 30 n.17 (2d ed 1969).

C. THE LAW OF MURDER AND THE MEANING OF THE FOURTEENTH AMENDMENT

If the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant from its mother's

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could be found to establish their right to life under the U.S. Constitution?

As the case for the unborn shows, it would do no good to object that no one ever heard of a "liberty" to deliberately kill the insane, or invalids, or Jews - or to object that such killings had thereto been defined as criminal.

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womb so it would die, as murder, then it is certain that they did not intend to exclude the lives of these children from the protection of the Fourteenth Amendment so it would be "liberty" to deliberately kill them with impunity from criminal statutes.

If the people who framed and adopted the Amendment had condemned the deliberate killing of Jews to be murder, it is certain that they did not intend to exclude Jews from the protection of the Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes. Changing the names of the victims does not change the legal result.

But by seizing upon viability, the Supreme Court decreed the same killing to be "liberty" which the American people had universally defined to be "murder" when the Amendment was adopted. It is a naked decree without any investigation whatever into the law of murder. In its ignorance, the Court decreed: "MASS MURDER IS LIBERTY."

Since the universal words "any person" in

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And the Fifth and Fourteenth Amendments merely state that they protect the life of "any person." So, as with the unborn, the Amendments do not expressly refer to the insane, or invalids, or Jews; and their legislative histories do not appear to specifically refer to the insane, or invalids, or Jews.

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the Fourteenth Amendment must include all persons whose lives were protected by the law of murder when the Amendment was adopted, the lives of these children were specifically guaranteed by the Amendment. And since personhood under the Constitution does not just fade away with time, like some magic disappearing ink, then the lives of these children are still protected by the Fourteenth Amendment. Roe v. Wade is void.

D. THE HYSTEROTOMY ABORTION UNDER ROE V. WADE

A common way to perform abortions under Roe v. Wade is by hysterotomy. Commonwealth v. Edelin, 359 N.E. 2d 4 (Mass. 1976). A hysterotomy is essentially a caesarean, in which a live but unviable child is taken from the womb and left to die. HEARINGS ON THE PROPOSED CONSTITUTIONAL AMENDMENTS ON ABORTION, BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES,

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As with the unborn, the murder laws don't expressly refer to the insane, or invalids, or Jews; and their legislative histories, to the extent they have any, do not appear to specifically refer to these groups.

The principle in the Declaration of

94th Cong., 2d Sess., Ser. 46, Part 1, at 391 (1976).

As established by medical testimony at these 1976 House abortion hearings, "With few exceptions, babies aborted by this method will all move, will all breathe, and some will cry.... Almost all were born alive." Id., at 397.

When the Fourteenth Amendment was adopted, these hysterotomy abortions were murder.

There are about 140,000 second stage abortion each year under Roe v. Wade. The Washington Post, April 26, 1985, page A11. All common second stage abortion methods can result in a child being born alive. When the Fourteenth Amendment was adopted, those abortions were murder.

F. CONCLUSION

Is a government of laws founded upon evidence, or the mere naked decrees of men holding office for life?

Since the U.S. Constitution is "the supreme law of the land," and the evidence proves indisputably that the lives of these children are protected by the U.S. Constitution, Roe v. Wade is void.

Independence, that all people are "created" equal, and endowed with an "unalienable" right to "life", having been sneered out of court in Roe v. Wade, now provides no assurance for anyone. The Court so perverted the Declaration of Independence as to amount to just this: "ALL MEN ARE CREATED EQUAL, EXCEPT THOSE CREATED TO BE MURDERED FOR THE CONVENIENCE OF OTHERS."

So, what factual, non-argumentative evidence is there for the insane, or invalids, or Jews to protect themselves from a judicial decree that it is "liberty" to deliberately kill them with impunity from criminal statutes?

The case for the unborn is the case for many others; it is this same body of factual evidence which many people must ultimately rely upon to establish that their right to life is protected by the U.S. Constitution.

If the people who framed and adopted the

Fourteenth Amendment had condemned the deliberate killing of Jews to be "murder," then it is certain that they did not intend to exclude the lives of Jews from the protection of the U.S. Constitution so it would be "liberty" to deliberately kill Jews with impunity from criminal statutes.

And merely changing the names of the victims would not change this conclusion.

Since the people who framed and adopted the Fourteenth Amendment had condemned the taking of a crying infant, whether viable or not, from its mother's womb so it might die, to be "murder," it is certain that the framers did not intend the Amendment to create a "liberty" to deliberately kill these children with impunity from criminal statutes. It is certain that the lives of these children are protected by the U.S. Constitution.

Since the right to life protected by the Constitution does not just disappear with

time, as whitewash weathers off an aging fence, it is certain that the lives of these children are still protected by the U.S. Constitution. And since the Constitution is the "supreme law of the land," it is certain that Roe v. Wade is void.

If the Court had decreed it "liberty" to deliberately kill Jews, it would rightly be condemned as murder. Judges may have more sympathy for other victims, but changing the names of the victims will not change the legal result. Lack of sympathy for the victim has never been a defense to murder.

In his novel, "1984," Orwell described how a tyranny defrauded its subjects into obedience with the "doublethink" slogan "FREEDOM IS SLAVERY." Although this science fiction appears improbable, the U.S. Supreme Court has defrauded the United States into obedience with the ultimate falsehood: "MASS MURDER IS LIBERTY."

Abraham Lincoln ridiculed the Dred Scott decision by reducing it to its plainest

terms: "That if any one man, choose to enslave another, no third man shall be allowed to object."[2] In Roe v. Wade the Court invented the ultimate fraud: "That if any one man, choose to murder another, no third man shall be allowed to object."

The U.S. Supreme Court has Hitler-like asserted to legalize mass murder. By changing the names of the victims, the Court has duplicated the decree of "the supreme judge" of Nazi Germany.[3]

2./ 2 Collected Works of Abraham Lincoln 462 (Basler ed. 1953). In Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 451 (1857), the U.S. Supreme Court held that the word "person," as used in the Constitution, did not include Negroes. While the Court did not assert a "liberty" to deliberately kill Negroes, the Court did rule that "the right to property in a slave is distinctly and expressly affirmed in the Constitution," and Congress could not prohibit slavery in the federal territories.

3./ The Nuremberg court described how Hitler was "the supreme judge" of Nazi Germany. United States v. Altstoetter, 3 Trials of War Criminals Before the Nuernberg Military Tribunals 1011 (1951). The "supreme judge" decreed deliberate killings to be legal which had been defined by statute to be criminal. At Nuremberg,

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When judges decree "MASS MURDER IS LIBERTY"; and "That if any one man, choose to murder another, no third man shall be allowed to object"; and "ALL MEN ARE CREATED EQUAL, EXCEPT THOSE CREATED TO BE MURDERED FOR THE CONVENIENCE OF OTHERS"; then it cannot be pretended that judges obey the U.S. Constitution. The human mind cannot conceive a more lawless decree.

Since the U.S. Constitution is "the supreme law of the land," and the lives of these children are indisputably protected by the Constitution, Roe v. Wade is void.

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the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, since they had acted within the authority of the decrees of "the supreme judge." United States v. Altstoetter, supra, 983-85. But the Court held, "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, 985.

By changing the name of the victims, the Supreme Court has duplicated the decree of "the supreme judge" of Nazi Germany. But changing the name of the victims will not change the legal result. The dagger of the assassin has been concealed beneath the robe of the jurist. Roe v. Wade is murder.

II.

ROE v. WADE IS VOID BECAUSE THE COURT USED FALSE EVIDENCE, AND UNCONSTITUTIONAL BURDENS OF PROOF, TO INFER THAT "THE WORD 'PERSON,' AS USED IN THE FOURTEENTH AMENDMENT, DOES NOT INCLUDE THE UNBORN." THE UNIVERSAL WORDS "ANY PERSON," AS USED IN THE CONSTITUTION, DO INCLUDE THE UNBORN.

A.

THE SUPREME COURT ADMITTED THAT IF THE UNIVERSAL WORDS "ANY PERSON" INCLUDED THE UNBORN, THE ALLEGED "LIBERTY" TO KILL THE UNBORN "OF COURSE, COLLAPSES."

The Court admitted that if the unborn were "a 'person,' within the language and meaning of the Fourteenth Amendment," then the case for a "liberty" to kill the unborn, as claimed in Roe v. Wade, "of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." Roe v. Wade, 410 U.S. at 156-157.

B.

THE UNIVERSAL WORDS "ANY PERSON" MAKE NO DISTINCTION BETWEEN BORN AND UNBORN LIFE, AND ON THEIR FACE INCLUDE THE UNBORN, AS EVERYONE ELSE.

The words of the Fourteenth Amendment ("nor shall any state deprive any person of life ... without due process of law") are

"universal in their application, to all persons ... without regard to any differences." Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The universal words "any person" make no distinction between born and unborn persons, and on their face admit of no exceptions whatever. Thus, on their face, the universal words "any person" include the unborn, as everyone else.

C.

THE RULINGS OF CHIEF JUSTICE MARSHALL SHOW THAT THE COURT MUST SATISFY THE HEAVIEST BURDEN OF PROOF TO IMPLY AN EXCEPTION TO THE UNIVERSAL WORDS "ANY PERSON" SO MILLIONS OF VICTIMS CAN BE KILLED WITH IMPUNITY FROM CRIMINAL STATUTES.

The holdings of Chief Justice John Marshall prove that the Supreme Court has no lawful power to imply an exception to universal terms, such as "any person," unless:

1. the Court can show that "the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in

rejecting the application";[1] and

2. the Court can prove that "had this particular case been suggested [to the framers], the language would have been so varied, as to exclude it, or it would have been made a special exception."[2]

The Supreme Court of West Germany used this long-established rule to hold that the universal words, "Everybody has the right to life," did include the unborn.[3]

1./ Sturges v. Crowninshield, 4 Wheat. 122, 203 (1819). Before the Court can exclude the unborn from the universal words "any person," so they can be deliberately killed with impunity from criminal statutes, the Court must prove that including the unborn within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

2./ Dartmouth College v. Woodward, 4 Wheat. 518, 644 (1819). The Court had to prove that if the case of the unborn had been suggested to the Framers, they would have changed the Amendment to read: "Nor shall any state deprive any person, except unborn persons, of life ... without due process of law."

3./ In 1975, the Supreme Court of West Germany ruled that the universal words in its Constitution, "Everybody has the right

The Court bore an extraordinary burden of proof to imply an exception to the universal terms "any person" so millions of persons could be deliberately killed with impunity from criminal statutes.[4]

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to life," did include the unborn, and that "Abortion is an act of homicide," and the state had a "duty ... to protect unborn life." The court based its holding on the the universal word "Everybody":

"The right to live is guaranteed to everybody who is 'alive.' No distinction can be made among the several stages of developing life before birth, or between prenatal and postnatal life. 'Everybody' ... means every 'living person,'... therefore 'everybody' in this sense also includes unborn human beings." Translation in R.A. Destro, Abortion and the Constitution: The Need For A Life Protective Amendment, 63 Cal. L. Rev. 1250, 1342, 1348-49 (1975).

This is the correct rule of construction, and its correct application.

4./ The truth of this extraordinary burden can be demonstrated by applying it to various cases. Before the Court could imply an exception to the universal terms "any person," so that Jews could be deliberately killed with impunity from criminal laws, the Court would have to prove that "the absurdity and injustice" of including Jews within the universal terms "any person" would be "so monstrous, that all mankind would, without hesitation, unite in

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D.

THE SUPREME COURT FABRICATED FALSE EVIDENCE TO INFER THAT "THE WORD PERSON, AS USED IN THE FOURTEENTH AMENDMENT, DOES NOT INCLUDE THE UNBORN."

The people who framed and adopted the Fourteenth Amendment had already democratically defined the killing of the unborn to be a crime. The Supreme Court knew it could not imply an exception to the universal words "any person" in the Constitution in order to decree "MASS EXTERMINATION, DEMOCRATICALLY DEFINED TO BE CRIMINAL, IS LIBERTY."

So the Supreme Court fabricated evidence to make it appear that those 19th century abortion statutes were not intended

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rejecting the application." Sturges v. Crowninshield, supra. And the Court must prove that if the case of the Jews had been suggested to the framers of the Fourteenth Amendment, "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra. The framers would have changed the Amendment to read: "No state shall deprive any person, except Jews, of life without due process of law."

This same burden of proof applies to one and all, including the unborn.

to protect the lives of the unborn. Roe v. Wade is based on false evidence.[5]

5./ SUMMARY OF FALSE EVIDENCE

When the Fourteenth Amendment was adopted in 1868, over three-fourths of the ratifying states had already enacted criminal statutes which made abortion at any stage of gestation a crime unless it were necessary to save the life of the mother or child. Within a few years, these statutes were universal.

In those few states still controlled by the common law on abortion, it is not possible to state with any assurance that the law was any different than in those states with abortion statutes. Some state supreme courts had ruled that the common law made abortion a crime throughout gestation. Mills v. Comm. 13 Pa. 631 (1850); State v. Slagle, 83 N.C. 544 (1880); State v. Reed, 45 Ark. 333 (1885). And those state supreme courts which ruled that abortion prior to quickening was not a common law crime were immediately overruled by their legislatures which made abortion at any stage of pregnancy a crime. Comm. v. Parker, 50 Mass. 263 (1845), was immediately overruled by Mass. Acts & Resolves ch. 27 (1845). State v. Cooper, 22 N.J.L. 52 (1849), was immediately overruled by N.J. Laws at 266 (1849). Abrahams v. Foshee, 3 Iowa 274 (1856) was overruled by the next legislature, Iowa Rev. Laws, tit. XXIII, ch. 165. art. 2, sec. 4221 (1860).

Any theory of a "liberty" to deliberately kill the unborn faced an impossible contradiction: How was it possible that the people who adopted the Fourteenth Amendment had enacted criminal statutes to

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The purpose of the falsification was to make it appear that this nation had always deemed abortion to be "liberty," and not crime. The Supreme Court perpetrated the

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protect the lives of the unborn, but at the same time, without a single word of explanation, intended to imply an exception to the universal terms "any person" so there would be a "liberty" to deliberately kill the unborn with impunity from their criminal statutes? This absurd contradiction wrecks Roe v. Wade.

To resolve this fatal contradiction, the Supreme Court fabricated the hypothesis that when the criminal abortion statutes were first enacted, the laws were not intended to protect the unborn life, but were only intended to protect the mother. This hypothesis was falsely fabricated and used as follows:

A.

The Supreme Court first asserted, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman." Roe v. Wade, 410 U.S. at 148. This is asserted as fact.

The only authority cited by the Supreme Court to prove this assertion of fact was a 20th century medical history book, Haagensen and LLoyd, A Hundred Years of Medicine 19 (1943), cited in Roe v. Wade, supra, at 148 n. 43. But, this book merely described the hazards of major surgery in general prior to Lister's discovery of antiseptics. The book did not even mention the abortion operation.

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Orwellian crime of falsifying the history of the United States to make criminal extermination appear to be "liberty."

If the Court had decreed it "liberty" to deliberately kill Jews, and fabricated evidence to make it appear that the American people had always deemed it liberty, and not crime, to kill Jews, then it would rightly be condemned as murder. Judges might have greater sympathy for other victims, but changing the name of the victims will not change the legal result.

The 19th Century obstetric authorities throughout the Western world prove the Court's assertion of fact to be false.

These 19th century obstetric authorities, based on their own experience in performing abortions, and from hundreds of cases reported from around the world, declared in their obstetric textbooks that the abortion operation, the operation of artificially evacuating the fetus from the womb, was "perfectly safe" to the mother, 2 T. Denman, M.D., An Introduction to the Practice of Midwifery 96 (1802) (English physician); or "experience has proved that the dangers of the operation are reduced to a small matter," A.L.M. Velpeau, M.D., A Complete Treatise on Midwifery 530 (4th

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The lives of the unborn must be protected by the Fourteenth Amendment. The framers used the universal terms "any person," without any exceptions. And no exception may be implied. The people had already enacted criminal statutes to protect the

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American ed. 1852) (French physician); or "to the mother there is very little danger." H.L. Hodge, M.D., The Principles and Practice of Obstetrics 293 (1864) (American physician). The 19th century obstetric authorities prove the Supreme Court's assertion of fact to be false.

The Supreme Court never revealed the "hazardous" abortion "procedure" to which it was referring. Actually, the 19th century physicians generally used the ancient method: "the membranes of the ovum are punctured," which permitted "the discharge of the waters," which induced the "action of the uterus," which resulted in the expulsion of the fetus from the womb. 2 Denman, supra, at 99. One 19th century physician traced this operation back almost 2000 years. F. Ramsbotham, M.D., The Principles and Practice of Obstetric Medicine 724 (4th ed. 1856).

Consequently, the 19th century physicians were generally using an ancient abortion procedure which they described as not hazardous to the life of the woman.

The Supreme Court did not examine even one single 19th century obstetric textbook. And the medical textbooks prove its assertion

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lives of the unborn. No court can imply an exception to the universal terms "any person" to decree: "MASS EXTERMINATION, DEMOCRATICALLY DEFINED TO BE CRIMINAL, IS LIBERTY." So the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

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of fact, "When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman," to be false.

Since abortion was not dangerous to the life of the mother, the only motivating purpose the abortion statutes could have had was to protect the lives of the unborn from destruction by abortion, even safe abortions by physicians. Had it been the purpose of the legislators to only protect the mother, they would have only required abortions to be performed by physicians, which were known all over the western world to be safe to the mother.

B.

The Supreme Court next asserted: "Abortion mortality was high." Roe v. Wade, 410 U.S. at 149. This is asserted as fact.

The Supreme Court asserted "Abortion mortality was high" without any authority to support it. It is a naked assertion. The 19th century obstetric authorities prove this assertion of fact to be false. The medical authorities expressly asserted that the abortion operation was not hazardous to the life of the mother. (continued next page)

E.

THE SUPREME COURT ALSO REVERSED THE BURDENS OF PROOF AND PERSUASION DESCRIBED BY CHIEF JUSTICE JOHN MARSHALL.

Instead of placing the burden on the advocates of the killings to prove that including the unborn within the universal terms "any person" would "be so monstrous,

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The purpose of this assertion is to go beyond the mere theory that abortion was hazardous to the mother, and imply that the carnage was so great as to call for legislation to protect mothers from the medical profession.

But the obstetric texts prove the Court's assertion, "Abortion mortality was high," to be a false statement of fact.

C.

Upon these two false assertions of fact, the Court falsely infers that "a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." Roe v. Wade, 410 U.S. at 149. This is a false inference, drawn from false assertions of fact.

Moreover, the 19th century treatises on criminal law state that these criminal abortion laws were intended to protect the lives of the unborn. 2 F. Wharton, A Treatise on the Criminal Law of the United States 200-203 (7th ed. 1874). There is none to the contrary. If the purpose of

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that all mankind would, without hesitation, unite in rejecting the application," the Court unconstitutionally reversed the burden of proof and persuasion. The Court had to prove that if the case of

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these laws had been to protect the mother, and not the child, these texts would certainly have noted it.

Since abortions by physicians were known all over the western world to be safe to the mother, the motivating purpose of these abortion laws could only have been to protect the lives of unborn children from destruction from abortions. That legislatures prohibited safe abortions by physicians, despite the great danger to the mother from abortions by criminals, shows their great respect for unborn life.

D.

The Court used its false evidence to exclude the unborn from the protection of the U.S. Constitution:

First, by falsely asserting that the 19th century abortion statutes were not intended to protect unborn life, the Court dismissed those statutes as irrelevant to determine the intention of the Fourteenth Amendment to protect unborn life. The Court turned to the common law for this intention.

Second, the Court next fabricated a false history which made abortion appear to be a 19th century liberty. The Court did this by asserting that the common law, which did not prohibit abortion prior to quickening, proved that abortion on demand was deemed a

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the unborn had been brought to the attention of the framers, they would have changed it to read: "(N)or shall any state deprive any person, except unborn persons, of life without due process of law."

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liberty in the 19th century:

> "It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today." Roe v. Wade, 410 U.S. at 140.

It is not true that the common law prevailed for "the major portion of the 19th century." The States began enacting abortion statutes in the 1820's, and by 1851 the majority of the States which ratified the Fourteenth Amendment had already enacted criminal abortion statutes which forbade abortion throughout gestation. Legal abortions were the same then, as in most states when Roe v. Wade was decided - to save the life of the mother or child. Thus the Court made another false statement of fact.

Moreover, "the major portion of the 19th century" is not relevant. Slavery was also far freer for the major portion of the 19th century than it is today. If the Court

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But the Court assumed that the universal words "any person" did not include the unborn, and placed its heaviest burden on the unborn to prove that they were included. The Court placed the burden

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could ignore the events of 1860 to 1866 - the civil war, Emancipation Proclamation, and Thirteenth Amendment - it could plausibly reaffirm its Dred Scott rule that there was a constitutional right to own a slave, thus exposing the falsity of its "major portion" doctrine. The true issue is the conditions existing when the Amendment was adopted. By then the abortion statutes had overwhelmingly repudiated the common law rule that abortion prior to quickening was not a crime; within a few years these statutes were universal.

And the Court misrepresented the common law. The state supreme courts which adhered to the old common law view, that abortion prior to quickening was not a crime, were immediately overruled by their state legislatures. And in 1850, the state supreme courts began to rule that the common law did prohibit abortion throughout gestation. Consequently this Court cannot assert with any assurance that the common law was any different than the statutory law when the Amendment was adopted.

Third, from its false and irrelevant history, the Court inferred that the lives of the unborn were not protected by the U.S. Constitution:

> "(O)ur observation, supra, that throughout the major portion of the

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on the unborn to prove with "assurance" (which means to make certain and put beyond doubt) that they were persons within the universal words "any person," or the unborn

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> 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Roe v. Wade, 410 U.S. at 158.

The Court's assertion, "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today," is false. The opposite was true. The 1973 statutes (listed in Roe v. Wade, 410 U.S. at 140 n.37) prove that legal abortion was far freer in 1973 than when the Amendment was adopted. When the Amendment was adopted, the statutes only permitted abortion to save the life of the mother or child. By 1973, four state statutes permitted abortion on demand; fourteen permitted abortion to preserve the mother's mental health, etc. While legal abortion was the same in most states as when the Amendment was adopted, this minority change made legal abortion far freer in 1973 than in 1868. With the unborn thus excluded from the protection of the Constitution by false facts and false history, this Court asserted that the unborn could be killed with impunity form criminal statutes.

Conclusion

The Court bore the burden of proving that the absurdity and injustice of including the unborn within the universal words "any

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would be excluded from the terms "any person" so they could be deliberately killed with impunity from criminal statutes.

The Court reversed the burdens of proof

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person" would be "so monstrous, that all mankind would, without hesitation, unite in rejecting the application." Sturges v. Crowninshield, supra. And the Court had to prove that if the case of the unborn had been presented to the framers and adopters of the Fourteenth Amendment, "the language would have been so varied, as to exclude it." Dartmouth College v. Woodward, supra. The framers would have changed the Amendment to read: "(N)or shall any state deprive any person, except unborn persons, of life without due process of law."

But, the Court could not find even one 19th century authority that agreed with its conclusion that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn," much less one who asserted that there was a "liberty" to deliberately kill the unborn with impunity from criminal statutes. History shows why.

History demonstrates that the framers did intend the Amendment to protect the unborn: they used the universal words "any person," without any exceptions; and no exception may be implied because the people had already enacted criminal abortion laws to protect the unborn in fact. The universal words "any person," as used in the Fourteenth Amendment, must include the unborn.

in the following manner:

First, the Court declared a "liberty" to deliberately kill the unborn with impunity from criminal statutes.[6]

Second, subsequently, the Court looked to see if the lives of the unborn were protected by the Fourteenth Amendment.[7]

Third, the purpose of first decreeing a "liberty" to deliberately kill the unborn, before the Court even looked to see if the lives of the unborn were protected by the Constitution, was to impose the "compelling state interest" test on the unborn. This placed a very heavy burden on the unborn

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6./ Roe v. Wade, 410 U.S. at 153.

7./ Roe v. Wade, 410 U.S. at 156-157. The Court assumed the very thing which was to be proved by evidence. By the Court's own admission, if the lives of the unborn were protected by the Fourteenth Amendment, then the alleged "liberty" to kill the unborn "of course, collapses." **But, the Court decreed a "liberty" to kill the unborn, before it even looked to see if their lives were protected by the Constitution.** It is analogous to a court finding an accused to be guilty before it heard the evidence.

to prove that their right to life was protected by the Constitution.[8]

Fourth, the Court stated that the evidence did not prove "with any assurance" that the lives of the unborn were protected by the U.S. Constitution.[9] This confirms that the Court placed the burden on the unborn to prove with "assurance" that their lives are protected by the Constitution.

Finally, the Court ruled that the unborn had not met their burden of proof and the unborn could be deliberately killed with impunity from criminal statutes.

This process is analogous to a court first adjudging the accused in a criminal

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8./ Roe v. Wade, 410 U.S. at 156. As its compelling state interest, Texas claimed that the lives of the unborn were protected by the Fourteenth Amendment, and that the purpose of their abortion statute was to protect the lives of the unborn. Thus, a heavy burden of proof was placed on the defenders of the abortion statute to prove that the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

9./ Roe v. Wade, 410 U.S. at 157.

case to be guilty, before it even heard the evidence, then placing the burden on the accused to prove himself innocent beyond a reasonable doubt, or be hanged.

If the Court first decreed a "liberty" to kill Jews, and then placed the burden on the Jews to prove with "assurance" that their lives were protected by the Constitution, it would rightly be condemned as murder. Judges may have more sympathy for other victims, but changing the name of the victims will not change the legal result.

Rather, under the rulings of Chief Justice Marshall, the burden was on the Court to prove with "assurance" that the unborn were not included within the universal terms "any person," or they would be included. Under this burden, the words "any person" do include the unborn.

F.

THE UNIVERSAL WORDS "ANY PERSON," AS USED IN THE FIFTH AND FOURTEENTH AMENDMENTS, DO INCLUDE THE UNBORN. THIS IS INDISPUTABLE.

The evidence for the unborn is far

stronger than for other groups which the Court has judicially recognized to be included within the terms "any person."[10]

The U.S. Supreme Court has defied the universal words "any person" in the Fourteenth Amendment, and their spirit,[11]

10./ The Court was so sure that "corporations" were included within the universal terms "any person" that it forbade any oral argument to the contrary. Santa Clara v. So. Pac. RR, 118 U.S. 394, 396 (1886). And the Court held that "strangers and aliens" were included within the terms "any person" by merely observing: "These provisions are universal in their application." Yick Wo v. Hopkins, supra, at 369. No evidence whatever was required.

11./ The uncontradicted scientific medical evidence in Roe v. Wade showed that the unborn child is "alive"; the heart begins "pulsations at 24 days"; and "brain waves have been noted at 43 days."

This Court ruled: "The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life...' While such declaration of principles may not have the force of organic law, ... yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution

and the plain intention of its framers and adopters,[12] and condemned to death millions of victims whom the Constitution of the United States endeavors to preserve.

The evidence proves that the universal words "any person," as used in the Fourteenth Amendment, do include the unborn.

And the universal words "any person," as used in the Fifth Amendment, must also

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in the spirit of the Declaration of Independence." Gulf, Colo. & S. Fe Ry v. Ellis, 165 U.S. 150, 159-160 (1896).

The undisputed medical evidence proves that the unborn child has been "created," it is thus endowed with an "unalienable" right to "life." So the universal terms "any person," as used in the Amendment, must also include the unborn. The right to life of the unborn is guaranteed, not just by the spirit of the Declaration of Independence, but by the express words of the U.S. Constitution.

Roe v. Wade corrupted the Declaration of Independence to read: "All men are created equal - except those created to be killed for the convenience of others."

12./ The people who adopted the Fourteenth Amendment not only used universal words (that not "any person," could be deprived of life without due process of law) without any distinction between born or unborn life, but those people had already enacted

include the unborn.[13] And the unborn are also protected by 18 U.S.C. § 242.[14]

Since the U.S. Constitution is "the supreme law of the land," and its universal terms "any person" do indisputably include the unborn, it is also indisputable that Roe v. Wade is void.

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criminal abortion statutes to protect the lives of the unborn. No court can imply an exception to the universal terms "any person" to decree: "MASS EXTERMINATION, DEMOCRATICALLY DEFINED TO BE CRIMINAL, IS LIBERTY."

13./ As the Court reasoned in Bolling v. Sharpe, 347 U.S. 497 (1954), since the Fourteenth Amendment prohibits racially segregated schools in the States, it would be "unthinkable" that the Fifth Amendment permitted them in the District of Columbia. By the same reasoning, since the killings are prohibited in the States by the Fourteenth Amendment, it is "unthinkable" that the Fifth Amendment could permit them in the District of Columbia. Regardless of the intention of the Fifth Amendment, the purpose of a subsequent amendment is to amend. Hunter v. Underwood, __ U.S. __, 85 L Ed 2d 222, 231 (1985).

14./ 18 U.S.C. § 242 protects all persons whose lives are guarded by the Fourteenth Amendment. Screws v. United States, 325 U.S. 91, 98 (1944). Since the words "any person" do include the unborn, their lives are also protected by 18 U.S.C. § 242.

III.

ROE v. WADE IS VOID BECAUSE THE SUPREME COURT USED UNCONSTITUTIONAL AND CRIMINAL PROCEDURES TO EFFECT AND MAINTAIN THE ROE v. WADE KILLINGS.

The Supreme Court willfully used unconstitutional procedures to effect the Roe v. Wade killings.[1]

1./ The Court willfully used the following unconstitutional procedures, despite objection, to effect Roe v. Wade:

A. Denial of Assistance of Counsel

Counsel did not especially represent the unborn in the District Court in Roe v. Wade. And the Supreme Court denied a request by an original party to allow counsel to especially represent the unborn in the Supreme Court. Thus, counsel did not represent the unborn at any stage of the original proceedings.

B. Denial of Prior Notice

The District Court did not even look to see if the lives of the unborn were protected by the U.S. Constitution; this question was argued for the first time after Roe v. Wade reached the Supreme Court. And the Supreme Court gave the parties no prior notice of the constitutional standards, or the burdens of proof, or the evidence, which the Court used to infer that the lives of the unborn were not protected by the Constitution. The first time the parties had notice was when Roe v. Wade was published, and the victims were already condemned to death. An original party objected that it lacked the prior notice needed to defend the unborn.

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And the Supreme Court subsequently decided many abortion cases on the merits, but, despite objection that the process was unconstitutional, willfully used unconstitutional procedures to maintain the Roe v. Wade killings:

1. The Supreme Court willfully refuses to allow retained (no cost to taxpayers)

C. Secret Evidentiary Proceedings
The Court used some secret evidentiary process, not open to the parties, to find evidence to infer that the lives of the unborn were not protected by the U.S. Constitution. An original party objected that it had not had opportunity to cross-examine the Court's evidence in a judicial proceeding.

D. Denial of Right to Cross-Examine
An original party asked permission to cross-examine the evidence which the Court used to infer that the lives of the unborn were not protected by the Constitution. But the Supreme Court would not allow its evidence to be cross-examined.

E. Denial of Right to Present Evidence
An original party asked permission to present evidence under the new constitutional standards which it had not seen before to show that the lives of the unborn are protected by the Constitution. But the Court refused to allow it. And the killings commenced.

counsel to represent the victims being killed and defend their right to life;[2]

2. The Supreme Court willfully refuses to allow its evidence in Roe v. Wade, which it used to infer that the lives of the unborn are not protected by the U.S. Constitution,

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2./ Some of the cases are: Colautti v. Franklin, 439 U.S. 379, motion to allow counsel to represent the unborn denied 437 U.S. 902; Anders v. Floyd, 440 U.S. 445, motion to allow counsel to represent the unborn denied 439 U.S. 890; Bellotti v. Baird, 443 U.S. 622, motion to allow counsel to represent the unborn denied 439 U.S. 1065; Ashcroft v. Freiman, affirmed 440 U.S. 941, motion to allow counsel to represent the unborn denied, 440 U.S. 941; United States v. Zbaraz, 448 U.S. 358, motion to allow counsel to represent the unborn denied 444 U.S. 1030; Harris v. McRae, 448 U.S. 297, motion to allow counsel to represent the unborn denied 445 U.S. 941; H.L. v. Matheson, 450 U.S. 398, motion to allow counsel to represent the unborn denied 445 U.S. 959; Simopoulos v. Virginia, 462 U.S. 506, motion to allow counsel to represent the unborn denied 458 U.S. 1104; Planned Parenthood of Kansas City v. Ashcroft, 462 U.S. 476, motion to allow counsel to represent the unborn denied 458 U.S. 1104; Akron Center for Reproductive Health v. Akron, 462 U.S. 416, motion to allow counsel to represent the unborn denied 458 U.S. 1104; Thornburgh v. American College of Obstetricians and Gynecologists, 90 L Ed 2d 779, motion to allow counsel represent the unborn denied 87 L Ed 2d 703.

to be confronted and cross-examined;[3]

3. The Supreme Court willfully refuses to allow evidence to be presented on behalf of the victims being killed to establish their right to life under the U.S. Constitution.[4]

The Supreme Court's own rulings on due process of law show these procedures to be unconstitutional.[5]

3./ See cases, supra note 2. The evidence in Roe v. Wade, used to infer that the lives of the unborn are not protected by the Constitution, has never been cross-examined, despite the charge that the Court used fabricated evidence.

4./ See cases, supra note 2.

5./ Even in civil proceedings, where crucial deprivations are threatened, such as loss of welfare, due process guarantees (1) prior notice of the factual and legal bases; (2) the right to be represented by counsel; (3) the right to confront and cross-examine adverse evidence; (4) the right to present evidence. Goldberg v. Kelly, 397 U.S. 254, 268-271 (1970); In Re Gault, 387 U.S. 1 (1967).

Could it be possible that procedures, which could not be used to deprive a mother of welfare, could be used to exclude her from the protection of the U.S. Constitution so that she could be deliberately killed with impunity from criminal statutes?

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Since the deprivation was willful, these procedures are also criminal.[6]

These are essentially the same procedures cited by the Nuremberg Court as part of the evidence to convict the Nazi judges of

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The Constitution would not permit any court to condemn even one single Jew to death in a criminal case, but deny any of these procedural rights. Then neither can any court condemn all Jews in the United States to death, but deny any of these procedural rights, by calling it a civil proceeding, and decreeing that the lives of Jews are not protected by the U.S. Constitution, and it is "liberty" to deliberately kill Jews with impunity from criminal statutes.

Any victim is entitled to all the procedural protections described in Goldberg v. Kelly, supra, before any court can decree that the victim's life is not protected by the U.S. Constitution, and the victim can be deliberately killed with impunity from criminal statutes. The rule for one is the rule for all.

6./ "Even judges ... could be punished criminally for willful deprivations of constitutional rights." Imbler v. Pachtman, 424 U.S. 409 (1976). The deprivation was "willful" because the Court repeatedly denied all these procedural rights in the teeth of the objection that the denial was unconstitutional and criminal. Thus the deprivation of these procedural rights was criminal.

complicity in extermination and murder.[7]

If the Supreme Court had used these procedures to decree it "liberty" to deliberately kill Jews, it would rightly be condemned as murder. While judges may have more sympathy for another category of victims, changing the names of the victims will not change the legal result.

Having decreed that "MASS MURDER IS LIBERTY," the Court now maintains the killings by criminally refusing to allow truth to work in its Court.

It is notorious that truth is not permitted to work in the proceedings in the U.S. Supreme Court, and that the Court

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7./ "In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were ... denied the right of counsel of their own choice, and occasionally denied the aid of any counsel... (T)he accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried." United States v. Altstoetter, supra, at 1046-47 (1951).

falsifies history to achieve its ends.[8]

The Supreme Court has made a murderous mockery of due process of law.[9]

The use of these procedures, to exclude millions of victims from the protection of the U.S. Constitution so they can be deliberately killed with impunity from criminal statutes, is unconstitutional, and makes Roe v. Wade void.

8./ "The Court ... has flouted the will of the framers and substituted an interpretation in flat contradiction of the original design .... Such conduct impels one to conclude that the Justices are become a law unto themselves. ... It perilously resembles ... Hitlerism." R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 408, 412 (Harvard Univ. Press 1977).

"Court had adjourned in the real world.... (T)hey [the Justices] began to invent a country suited to their purposes.... They have falsified the American past ... and no one in charge seems prepared to do anything about it." T. Landers, To A Traditionalist, Mr. Ron Sounds So Good, The Wall Street Journal, editorial page, December 27, 1984.

9./ A more complete description of the procedures used in Roe v. Wade is made in the MOTION TO ALLOW COUNSEL REPRESENT CHILDREN UNBORN AND BORN ALIVE, filed herein and incorporated by reference.

IV.

DUE PROCESS OF LAW HAS COMPELLED THE U.S. SUPREME COURT TO CONFESS IN COURT THAT IT IS GUILTY OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND TO ADMIT THAT ROE v. WADE IS UNCONSTITUTIONAL AND VOID.

For the 93rd time, the U.S. Supreme Court is accused in its own court with criminally exterminating millions of victims in violation of the U.S. Constitution, and 18 U.S.C. § 242.[1]

For the 69th time, the U.S. Supreme Court is accused in its own court with mass murder in violation of state and federal statutes;[2]

For the 73rd time, the U.S. Supreme Court is accused in its own Court of using unconstitutional and criminal procedures to effect and maintain the Roe v. Wade killings.[3]

But, the U.S. Supreme Court has never denied the charges, much less attempted to

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1./ Charges based on evidence, supra p. 16.

2./ Charges based on evidence, supra p. 3.

3./ Charges based on evidence, supra p. 38.

prove the charges to be false.

These facts are unparalleled in the legal history of the world.

Under this Court's own rulings, its silence year after year, while the victims are being killed, is an admission that the charges are true.[4]

> "Failure to contest an assertion, however, is considered evidence of

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4./ Under "the tacit confession rule," McCormick on Evidence, § 161, 270, failure to deny a charge is admissible as a confession that the charge is true. Also 4 Wigmore, Evidence, § 1071-1072 (Chadborn rev. 1972). "Underlying the rule is the assumption that human nature prompts an innocent man to deny false accusations and consequently a failure to deny a particular accusation tends to prove belief in the truth of the accusation." McCormick, supra, § 161. The Supreme Court has consistently affirmed this rule. "(T)he Court has consistently recognized that ... silence in the face of accusation is a relevant fact.... Silence is often evidence of the most persuasive character." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). And the rule is ancient. As Socrates cross-examined at his trial 2400 years ago: "(Y)ou are silent, and have nothing to say. But is not this rather disgraceful, and a very considerable proof of what I was saying?" "I may assume that your silence gives consent." Apology in Plato 41, 45 (Jowett transl. 1942).

> acquiescence only if it would have been natural under the circumstances to object to the assertion in question." United States v. Hale, 422 U.S. 171, 176 (1975).

The circumstances leave no doubt that due process of law has compelled the U.S. Supreme Court to confess that the charges are true, and that Roe v. Wade is void.

First, the evidence makes it as clear as daylight why the Court is silent in the face of the charges: the charges are proved to be true.[5] No denial is possible.

Second, the charges were made in cases filed pursuant to the Constitution and laws of the United States. The judges had a legal duty to fully hear allegations that Roe v. Wade was wrongly decided:

> "(I)ts opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its

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5./ The Supreme Court decreed killings to be "liberty" which had been defined by statutory law to be "murder." This is mere historical fact; no denial is possible. In plain terms, the Court decreed, "MASS MURDER IS LIBERTY."

judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 7 How. 282, 470 (1849).

If judges "close their eyes on the Constitution," and "condemn to death those victims whom the Constitution endeavors to preserve," it is a "crime."[6]

6./ Marbury v. Madison, 1 Cranch 137, 179-180 (1803). Chief Justice John Marshall wrote that for judges to swear to support the Constitution as the supreme law of the land, but then "close their eyes on the constitution," and "condemn to death those victims whom the Constitution endeavored to preserve" is worse than "solemn mockery," it is a "crime."

Chief Justice Marshall correctly stated the criminal law. Where there is an affirmative duty to act, the deliberate omission to do that duty, which results in death to others, can be prosecuted as homicide. Perkins, Criminal Law 604 (2nd ed. 1969).

The only Nazi to plea guilty at Nuremberg cited this law. When warned of Auschwitz, Speer wrote: "I did not investigate - for I did not want to know what was happening there.... [F]rom fear of discovering something which might have made me turn from my course, I closed my eyes." A. Speer, Inside the Third Reich 375-76 (1970). This "deliberate blindness" is complicity in criminal extermination.

Federal judges are guilty of crime when

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Third, the Court's steadfast silence, year after year, in the face of the scores of accusations that it is guilty of mass murder, is unparalleled in the legal history of the world; and it is the very circumstance which the Court itself has cited as making confession by silence more trustworthy.[7]

Fourth, not only has the Court's silence persisted in the face of repeated accusations, but it has persisted even in the teeth of warnings that, under its own

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they close their eyes, and permit victims to be killed, whom the Constitution endeavors to preserve. The Constitution imposes a legal duty on judges to fully hear and honestly decide allegations that victims are being exterminated in violation of the U.S. Constitution; and the criminal law punishes the violation of this duty.

7./ Concerning the Supreme Court's continuing silence year after year: "Silence gains more probative weight where it persists in the face of accusation, since it is assumed in such circumstances that the accused would be more likely than not to dispute an untrue accusation." United States v. Hale, 422 U.S. 171, 176 (1975).

rulings, its silence was being taken as an admission that the charges are true, and Roe v. Wade is void.[8]

Fifth, the charges described judicial corruption not surpassed in the history of the world, that:

(1) judges had criminally exterminated millions of children in violation of the Constitution and laws of the United States, and of the States;

(2) the United States was being ruled over by a tribunal of murderers which had proclaimed the most corrupt decree which the human mind could imagine: "MASS MURDER IS LIBERTY";

(3) due process of law had compelled the

8./ "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE." Amicus curiae brief by the Legal Defense Fund For Unborn Children, filed in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983).

judges to confess in their own court to guilt of mass murder; and

(4) the judges were maintaining their murders by conspiring to keep truth from working in all the courts of the United States.

Never in the legal history of the world was it more imperative to deny charges if they were untrue.

Judges, under solemn legal duty to uphold the law, are accused of mass murder in their own court year after year. The evidence is laid out in court. Little children are being killed. The killings violate criminal statutes. Pictures of the dead are shown to the judges. But year after year, the judges do not deny the charge, much less attempt to prove it false. The 2000 year old law of evidence, and the solemn legal duty imposed by a government of laws, condemn this silence as a confession that the charge is true,

and that Roe v. Wade is void.[9]

9./ Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983), is an example of how due process of law has compelled the Supreme Court to confess to guilt of mass murder, and to admit that Roe v. Wade is void - despite the Court's conspiracy both to keep truth from working in its Court, and still defraud the lower courts into blindly obeying Roe v. Wade.

In Akron, supra, neither the parties, nor the amicus curiae brief by the U.S. government, asked the Court to overrule Roe v. Wade. This was done by the amicus curiae brief by the Legal Defense Fund for Unborn Children, as follows: "For the 52nd time, the U.S. Supreme Court is accused in its own court with mass murder ..."

And the amicus brief laid out the evidence. And it showed a photo of a dead victim. And the amicus brief informed the Supreme Court that its silence in the face of the charge would be taken as an admission that the charge was true, and Roe v. Wade was void: "THE U.S. SUPREME COURT HAS CONFESSED IN COURT TO GUILT OF CRIMINAL EXTERMINATION, INCLUDING MASS MURDER, AND THIS IS THE LEGAL EQUIVALENT OF THE EXPRESS OVERRULING OF ROE v. WADE."

But in Akron, supra, the Supreme Court responded to these arguments by saying:

> "And arguments continue to be made, in these cases as well, that we erred in interpreting the Constitution. Nonetheless, the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands

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The immediate practical result is that due process of law has compelled the U.S. Supreme Court to admit that Roe v. Wade is a mistake of law. Truth has worked in the U.S. Supreme Court in the only manner in

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> respect in a society governed by the rule of law. We respect it today, and reaffirm Roe v. Wade."

Thus, the Court's response to the "arguments" that it was guilty of mass murder. If stare decisis is "never entirely persuasive on a constitutional question," even in normal cases, then it certainly carries no weight at all when judges try to hide behind stare decisis because they are accused of mass murder, and cannot prove the charge to be false. When a court rules that "respect in a society governed by the rule of law" requires the decree "MASS MURDER IS LIBERTY" to be obeyed without question, because the Court cannot deny that it is guilty of mass murder, it is the murderous mockery of "the rule of law." Although it cannot deny that it is guilty of mass murder, the Supreme Court supposes it can hide behind stare decisis and defraud the lower courts into obeying Roe v. Wade without question.

The "rule of law" will permit only one conclusion from such facts: the U.S. Supreme Court was met in court with the truth in Akron, supra, and due process of law compelled the court to admit, in the most emphatic manner which the human mind can imagine, that Roe v. Wade is void.

which it was permitted to work. Under our government of laws, the Supreme Court was met in court with the truth, and due process has compelled the Court to admit, in the most emphatic manner which the human mind can imagine, that Roe v. Wade is void.

Any judge who closes his eyes on these facts, unparalleled in legal history, and follows Roe v. Wade, knows he is guilty of complicity in extermination and murder in violation of the Constitution and laws of the United States, and of the States.[10]

The Constitution and laws of the United

10./ The Supreme Court asserted to legalize killings which had been defined as criminal by positive statutes. Since Roe v. Wade is a mistake of law, all the killings since 1973 can be criminally prosecuted.

The ex post facto provisions of the U.S. Constitution do not apply to judicial decisions which are a mistake of law. Ross v. Oregon, 227 U.S. 150, 161 (1912).

The general rule is that mistake of law is no excuse for breaking the law. R. Perkins, Criminal Law 920 (2d ed. 1969).

The limited affirmative defense of reasonable reliance on an official judicial

(continued next page)

States will permit only one conclusion to be drawn from these facts: the Supreme

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opinion, thereafter determined to be a mistake of law, does not apply to homicide cases. Model Penal Code, Tentative Draft No. 4, Comments Sec. 2.04, page 138; R. Perkins, Criminal Law 928 (2d ed. 1969).

Thus, the law applied at Nuremberg applies to this case. Obedience to the orders of judicial superiors is no excuse for complicity in murder. United States v. Altstoetter, supra, at 983-985. A mistake about the legality of orders of judicial superiors is no defense to murder.

The "supreme judge" of Nazi Germany decreed killings to be legal which had been criminal under statutory law. At Nuremberg, the Nazi judges claimed that they could not be held accountable for complicity in extermination and murder, because they were bound to obey the decrees of "the supreme judge." But the Nuremberg court rejected that defense. Obedience to superior judges is no defense in homicide cases. "The dagger of the assassin was concealed beneath the robe of the jurist." United States v. Altstoetter, supra, at 985.

It may be that the judges responsible for the Roe v. Wade murders did not believe that they were breaking the law. But, as Oliver Wendell Holmes wrote: "Ignorance of the law is no excuse for breaking it....It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but ... the lawmaker has determined to make men know and obey." O.W. Holmes, The Common Law 41 (paperback 1963).

(continued next page)

Court was met in court with the truth, and due process of law compelled it to admit, in the most emphatic manner which the human mind can imagine, that Roe v. Wade is unconstitutional and void.

Even if the Supreme Court held a gun to the head of a U.S. District Judge, and threatened instant death unless he obeyed Roe v. Wade, it would not be a defense to murder. As Blackstone explained it, "he ought rather to die himself than escape by the murder of an innocent." 4 Bl. Com. 30.

The law makes a mortal distinction between killing and not killing:

1. Any judge who stopped the Roe v. Wade killings, and made a mistake of law, could only be overruled on appeal;
2. But any judge who allows the killings to continue, despite the objection that the Supreme Court decreed "MASS MURDER IS LIBERTY," and makes a mistake of law, can be prosecuted for complicity in mass murder, and can be sentenced to death.

The law of capital murder is a hard school, where lessons are taught only one time, and mistakes of law are not forgiven.

Due process has compelled the Supreme Court to admit that Roe v. Wade is void. Any judge who ignores these facts, unparalleled in legal history, and chooses to take part in a national scheme to kill little children, in violation of criminal statutes, to support the decree "MASS MURDER IS LIBERTY," must deliberately hazard the death penalty.

The photo on the next page shows a second stage abortion by prostaglandin under Roe v. Wade. This can result in a child being born alive.[11] There are about 140,000 second stage abortions each year under Roe v. Wade.[12] Any procedure can result in a child born alive.[13]

If the child were born alive, this Court would be guilty of murder. If the child were born dead, this Court would be guilty of extermination under 18 U.S.C. § 242.

As the Court studies the face of its victim, let it contemplate that truth is working in this court, and the Court cannot stop it. Due process of law has compelled this Court to admit that Roe v. Wade is void, and thus to overrule Roe v. Wade.

11./ Floyd v. Anders, 440 F. Supp. 535, 538 (1977).

12./ Washington Post, April 26, 1985, A11.

13./ Jeffries and Edmonds, Abortion: The Dreaded Complication, The Philadelphia Inquirer, August 2, 1981.



CONCLUSION

This court has admitted that **Roe** v. **Wade** is void; now it must expressly overrule it.

_____

Alan Ernest, Counsel

JOINT

APPENDIX

No. 85-673

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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APPEAL DOCKETED OCTOBER 16, 1985
JURISDICTION POSTPONED OCTOBER 14, 1986

29pp

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement:

Opinion of the United States District Court for the Northern District of Illinois, dated May 4, 1984	App. 54
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In The

Supreme Court of the United States

October Term, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

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JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	ITEM
January 26, 1984	Complaint filed in the United States District Court for the Northern District of Illinois.
January 26, 1984	Plaintiffs' motion for a preliminary injunction or, in the alternative, a temporary restraining order filed.
January 26, 1984	Memorandum in support of plaintiffs' motion for a preliminary injunction, or in the alternative, for a temporary restraining order filed.
January 26, 1984	Plaintiffs' motion to maintain a class action filed.
January 31, 1984	Order dated January 26, 1984 entered: "On plaintiffs' motion for a preliminary injunction or, in the alternative, a temporary restraining order, enter temporary restraining order. DRAFT. (SEE DRAFT FOR FULL PARTICULARS.) Plaintiffs' motion to maintain class action is entered and continued to Monday, January 30, 1984. Status hearing is set for Monday, January 30, 1984 at 12:00 p.m. — WILL, S. J."
February 1, 1984	Order dated January 30, 1984 entered: "Status hearing held. By agreement of the parties, order temporary restraining order extended under the same terms and conditions until further order of the Court. Plaintiffs' motion to maintain

DATE	ITEM
	class action is granted. Plaintiffs are to submit a draft order within a short date re said motion. Parties are given to and including Feb. 27, 1984 to file simultaneous motions for summary judgment with supporting briefs; and to and including March 7, 1984, no later than 12:00 noon to file simultaneous answering briefs. The Court will set a ruling date in early April 1984. – WILL, S. J."
February 8, 1984	Defendants' objections to proposed class certification order filed.
February 21, 1984	Order dated February 17, 1984 entered: "Enter class certification order. (DRAFT) (See draft for full particulars) – WILL, S. J."
February 27, 1984	Plaintiffs' motion for summary judgment filed.
February 27, 1984	Memorandum in support of plaintiffs' motion for summary judgment filed.
February 28, 1984	Defendants' motion for summary judgment; memorandum of law in opposition to plaintiffs' motion for a preliminary injunction filed.
March 2, 1984	Affidavit of Stanley M. Johnston filed.
March 7, 1984	Defendant Hartigan's reply brief filed.
March 7, 1984	Plaintiffs' memorandum in opposition to defendants' motion for summary judgment and Exhibits A and B filed.

DATE	ITEM
March 20, 1984	Plaintiffs' sur-reply memorandum in support of their motion for summary judgment filed.
May 7, 1984	Order dated May 4, 1984 entered: "Enter memorandum opinion. Plaintiffs' motion for summary judgment is granted. Defendants are enjoined from enforcing any provisions of the Parental Notice Abortion Act of 1983. DRAFT (SEE DRAFT FOR FULL PARTICULARS). Memorandum opinion filed – WILL, S. J."
June 6, 1984	Defendant Richard M. Daley's notice of appeal of order dated May 4, 1984 filed.
June 6, 1984	Defendant Neil F. Hartigan's notice of appeal of order dated May 4, 1984 filed.
May 20, 1985	Opinion of the United States Court of Appeals for the Seventh Circuit.
May 20, 1985	Judgment of the United States Court of Appeals for the Seventh Circuit entered.

STATE OF ILLINOIS
COUNTY OF COOK—SS.

AFFIDAVIT
OF
DAVID ZBARAZ, M.D.

Affiant, DAVID ZBARAZ, M.D., being duly sworn on oath, deposes and states as follows:

1. I received my M.D. degree from the University of Illinois College of Medicine in 1965. I am a registered and licensed physician in the State of Illinois and am actively engaged in the practice of obstetrics and gynecology. I am currently on the staff of Michael Reese Hospital, Chicago, Illinois, and a clinical assistant professor of obstetrics and gynecology at the University of Chicago. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists. I am a member of the American Medical Association, and the Illinois State Medical Society and the Chicago Medical Society.

2. I share a practice with five other obstetrician/gynecologists. My practice is approximately fifty percent obstetrics, of which approximately three percent, are pregnancy terminations. A number of those are performed on minor patients.

3. Some of my minor patients are accompanied by one or both parents when I conduct pre-abortion examinations and consultations. However, others of my minor patients ask me if their parents have to be told about their pregnancy and their intent to terminate it. Some of these minors are sufficiently mature to make the abortion decision in consultation with me independently. Others express such fear of parental reaction that I have concluded

that it may not be in their best interests to notify their parents. Therefore, mandatory notice to both parents or to a legal guardian, when against the wishes of my patients, destroys the privacy and confidentiality of the physician-patient relationship, destroys the patient's trust in me, is against the medical interests of some of my patients, and causes harmful stress.

4. Some minor patients will avoid mandatory notice, not by the confusing and potentially lengthy legal proceeding which the Parental Notice of Abortion Act of 1983 provides, but by seeking criminal abortions thereby subjecting themselves to much greater risk of complications and death.

5. A mandatory 24 hour waiting period after the minor's parents have been told before the abortion can be performed is burdensome to minor patients, unjustifiably increases the cost of pregnancy termination, causes unnecessary and harmful stress, and is medically unjustifiable and punitive. Further, such a delay interferes with my professional relationship with my minor patients and with the exercise of my best medical judgment.

/s/ DAVID ZBARAZ, M.D.

[Notarization omitted in printing.]

STATE OF ILLINOIS
COUNTY OF COOK—SS.

AFFIDAVIT
OF
ALLAN G. CHARLES, M.D.

ALLAN G. CHARLES, M.D., being duly sworn, deposes and states as follows:

1. I received my M.D. degree in 1952 from the New York University College of Medicine and am a registered and licensed physician in the State of Illinois. I am actively engaged in the practice of obstetrics and gynecology and am currently a member of the Department of Obstetrics and Gynecology at both the Michael Reese Hospital and the Prentice Women's Hospital and Maternity Center, Chicago, Illinois, and am clinical professor of obstetrics and gynecology at the University of Chicago and at Northwestern University. I am a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetrics and Gynecology. I am a member of the American Medical Association, the Illinois Medical Society, the Chicago Medical Society, the Chicago Gynecological Society, International College of Surgeons, and the Central Association of Obstetricians and Gynecologists. I have researched and published numerous articles in the field of obstetrics and gynecology, including, but not limited to, articles on amniocentesis, the "Rh (Rhesus)" factor and a chapter in the Encyclopedia of Obstetrics and Gynecology on these subjects.

2. I share my practice with five other obstetricians/gynecologists. My practice is approximately 50 percent obstetrics, of which approximately 3 percent are pregnancy terminations. A number of those are performed on minor patients.

3. Many of my minor patients ask me if their parents have to be told about their pregnancy and their intent to terminate it. Some have expressed fear of their parents' reaction, including fear of physical violence.

4. To require that I or my agents notify a minor's parents of her intent to obtain an abortion prior to providing an abortion interferes with my professional relationship with that minor patient, and with the exercise of my best medical judgment respecting whether or not the abortion should be performed.

5. A mandatory 24 hour waiting period after the minor's parents have been told before the abortion can be performed is a further interference with my professional relationship with my minor patients and with the exercise of my best medical judgment. This is true for several reasons:

(a) When there is no medical necessity for delaying the abortion, my patient's confidence in me will be eroded if I am forced to tell her that I cannot proceed for at least 24 hours, and that she will have to return.

(b) Sending a minor patient away to return later can result in delays longer than 24 hours. Traveling arrangements, costs, and scheduling conflicts are all factors which would prolong the interim before a minor's return appointment.

6. Often pregnant minors are confused and uncertain as to what they should do. Consequently, they often delay making a decision until well into the first trimester of their pregnancy or even later. Medical risks with abortions increase as a pregnancy progresses, therefore any

required delay before an abortion can be performed is contrary to the best medical practices with respect to minors and unnecessarily increases the potential for medical complications.

/s/ ALLAN G. CHARLES, M.D.

[Notarization omitted in printing.]

STATE OF ILLINOIS
COUNTY OF COOK—SS.

AFFIDAVIT
OF
RUTH OSGOOD

Affiant, RUTH OSGOOD, being duly sworn on oath, deposes and states as follows:

1. I am currently the Director of Educational Services at the Concord Medical Center, Chicago, Illinois where I have been on staff since 1973. Concord is a licensed outpatient center providing various medical services, including first trimester abortions. I have done pregnancy counselling for twelve years in Chicago, and have spoken on numerous occasions to groups interested in the emotional, medical and legal issues surrounding abortions.

2. Approximately one-third of the abortion patients at Concord Medical Center are minors. It is my responsibility to co-ordinate educational, counselling and other support services to these young women.

3. Based on my knowledge and experience, it is my opinion that the Illinois Parental Notice of Abortion Act of 1983 is unrealistic with respect to meeting its stated purposes, and is unduly burdensome to pregnant minors and incompetents seeking abortions.

4. The requirement that both parents of a pregnant minor be notified of her intent to obtain an abortion unnecessarily adds additional stress to an already anxious, emotionally troubled minor. For instance, some minors are accompanied by one parent, usually their mother, when they come to Concord. I have often counselled with such mother-daughter couples, both of whom are concerned that

the husband/father not be told of the daughter's situation. Many of these minors have told me that their fathers threatened them with physical abuse or with being thrown out of the home, should they become pregnant. Mothers have confirmed their daughters' fears, and some have confided that they fear their husbands will blame them for their daughter's dilemma, and will subject them to abuse.

5. The judicial alternative to parental notice which the Act offers is not a realistic option for minors seeking abortions unless the minor is provided with assistance in initiating the judicial process. "Going to court" is a major event for adults. For an emotionally tense young girl, who is often already overwhelmed by her predicament, being told simply that she must "petition the Circuit Court" will seem an impossible task. I fear that many minors who don't want one or both of their parents notified, and who aren't able to cope with "petitioning the Circuit Court," may in despair end up waiting too long to have a safe abortion procedure and will either give birth to an unwanted child or will submit to an illegal and dangerous abortion procedure.

6. The mandatory 24 hour delay after a minor's parents have been told before the abortion can be performed constitutes a substantial burden to a minor seeking an abortion. In my experience, many pregnant minors have a tendency to "block out" the troublesome situation they're in. Consequently, they often delay making decisions until well into their pregnancy. When finally a decision to obtain an abortion is made, and resources, finances, etc., are arranged, to impose a mandatory delay of any length is to impose another, significant stress on a pregnant minor.

7. There are other burdensome consequences of a mandatory 24 hour delay. The cost of obtaining an abortion

will increase since a minor will be forced to make two trips to the abortion clinic. Also, scheduling conflicts for both the minor and the clinic may produce delays in excess of 24 hours. For the minors who have waited well into the first trimester of their pregnancy, or even later, before deciding to obtain an abortion, any further delay may have medical as well as emotional consequences.

/s/ RUTH OSGOOD

[Notarization omitted in printing.]

STATE OF ILLINOIS
COUNTY OF COOK—SS.

AFFIDAVIT
OF
ALEXA MARKOFF, M.S.W., A.C.S.W.

Affiant, ALEXA MARKOFF, being duly sworn on oath, deposes and states as follows:

1. I received a Master's Degree in Social Work from Washington University in St. Louis, Missouri, in 1975, and have been certified by the Academy of Certified Social Workers. I have done abortion counselling for the past twelve years. In 1980-1981, I was Director of Counselling at the Midwest Population Center, Chicago, Illinois. Since 1981 I have been a social worker at the Pregnancy Termination Unit at Michael Reese Hospital and Medical Center, and am currently a Medical Social Worker with a joint appointment in the Departments of Obstetrics and Gynecology, and Pediatrics. I have counselled numerous minors who sought abortions.

2. Based on my knowledge and experience, it is my opinion that the Illinois Parental Notice of Abortion Act of 1983 will significantly burden pregnant minors seeking abortions.

3. The requirement that both parents of a pregnant minor be notified of her intent to obtain an abortion adds additional stress to these young women who are already very anxious and upset. Typically, pregnant minors come to the clinic either with one parent, usually their mother, or alone or with friends. Many of these minors have told me that they don't want to tell one or both of their parents because they fear being beaten or even kicked out of their homes.

4. The judicial alternative to parental notice which the Act offers doesn't go far enough. These minors are already very stressed. They're pregnant and they don't want to be; they fear the abortion procedure itself; and medical protocol requirements can seem frustrating and complex to them. Unless a pregnant minor is given assistance in initiating the judicial process, many of them will be totally dismayed if they're told only that they must "petition the Circuit Court" to avoid notice to their parents. Many of them may decide to "forget it," and will end up having unwanted children or seeking an illegal, dangerous abortion procedure.

5. The mandatory 24 hour delay after a minor's parents have been told before the abortion can be performed is another burdensome provision of the Act. Many of the minors I have counselled arrive at the clinic expecting to get an abortion fairly quickly. They've already arranged travel, finances, etc. For those who do not already have parental support, learning that their parents have to be told, or that they must go to court to avoid telling them, will be overwhelming. Whichever they decide, minors will have to rearrange travel and reschedule appointments. Such factors will often result in delays exceeding 24 hours. For those minors who have waited until late into the first trimester of their pregnancy, or even later, before deciding to obtain an abortion, such further delays may have medical as well as emotional consequences.

/s/ ALEXA MARKOFF

[Notarization omitted in printing.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DAVID ZBARAZ, M.D., and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Plaintiffs,

v.

NEIL HARTIGAN, in his official capacity as Attorney General of the State of Illinois; and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; their agents and successors; and all others similarly situated,

Defendants.

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84 C 771 — Judge Will

CLASS CERTIFICATION ORDER

This cause coming on for hearing on January 30, 1984, before the Honorable Hubert Will, upon the plaintiffs' Motion to Maintain Class Action, arguments from counsel for plaintiffs and defendants having been heard and defendants having agreed that this matter ought to be certified as a plaintiff and defendant class action, and upon consideration of these arguments and the record,

IT IS HEREBY ORDERED that since the Court finds that each of the classes is so numerous that joinder of all members of each class is impracticable, there are questions of law and fact common to each of the classes, the

claims and defenses of the representative parties of each class are typical of the claims and defenses of each of the classes, the representative parties of each of the classes will fairly and adequately protect the interests of their respective class, and that the defendants and the defendant class will act or refuse to act on grounds generally applicable to each of the plaintiff classes, thereby making appropriate final injunctive or corresponding declaratory relief with respect to each class as a whole, this matter is certified as a class action under Rule 23(b)(2) Fed.R.Civ.P.

The classes are as follows:

(1) Allan G. Charles, M.D. and David Zbaraz, M.D., are the representatives of the plaintiff class consisting of all duly licensed physicians presently performing or desiring to perform pregnancy terminations for unemancipated minors and disabled persons in the State of Illinois, on their own behalves and on behalf of certain of their patients desiring abortions, including: (1) unemancipated minors capable of giving informed consent to an abortion procedure or whose best interests would not be served by notice to both parents, or where pertinent to a legal guardian, of the minor's intent to obtain an abortion; and (2) adjudicated disabled persons for whom a guardian has been appointed pursuant to Ill. Rev. Stat. ch. 110½ §§11a-3(a)(1) or 3(3), whose disability does not impair their ability to give informed consent to an abortion procedure, or whose best interests would not be served by notice to their guardian of the disabled person's intent to obtain an abortion.

(2) Defendant Richard M. Daley, in his official capacity as State's Attorney for Cook County, Illinois is the

representative of the defendant class comprised of all the State's Attorneys of the various counties of the State of Illinois.

DATED: FEB. 17 1984

/s/ HUBERT L. WILL
U.S. District Court Judge

STATE OF ILLINOIS
COUNTY OF SANGAMON—SS.

AFFIDAVIT
OF
STANLEY M. JOHNSTON

1. I am the Executive Secretary (the principal executive officer) of the Illinois Legislative Reference Bureau which is the agency of the Illinois General Assembly charged with the drafting of legislation for members of the General Assembly.

2. The source draft supplied to the Legislative Reference Bureau on behalf of Senator Leroy W. Lemke to be used in preparing the draft of a bill to enact the Abortion Notice Act of 1983 included a section setting out a typical severability clause.

3. The draft provided by the Legislative Reference Bureau to Senator Lemke which was introduced as Senate Bill 521 and which, as amended, became law as Public Act 83-890 did not include such a severability clause.

4. Public Act 79-1178, certified December 18, 1975, added Section 1.30 to "An Act to revise the law in relation to the construction of the statutes", approved March 5, 1874, as amended. The added Section which has been renumbered as Section 1.31 now appears as paragraph 1032 of Chapter 1 of the *Illinois Revised Statutes* and reads as follows:

"Sec. 1.31. If any provision of an Act enacted after the effective date of this amendatory Act or application thereof to any person or circumstance is held invalid, such invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid

application or provision, and to this end the provisions of each Act enacted after the effective date of this amendatory Act are severable, unless otherwise provided by the Act."

5. To avoid unnecessary duplication in the statutory laws of Illinois, the Legislative Reference Bureau relies on this provision as a statement of the legislature's intention on the subject of severability in legislation enacted after the effective date of Public Act 79-1178 and incorporates express provisions in new legislation only when a different result is intended, as when a certain provision is considered to be essential to the legislature's purpose so that its invalidity must result in the rejection of the entire Act.

/s/ STANLEY M. JOHNSTON

[Notarization omitted in printing.]

ILLINOIS PARENTAL NOTICE OF ABORTION ACT OF 1983

Par.
81-61. Short title.
81-62. Legislative purpose and findings.
81-63. Definitions.
81-64. Notice required.
81-65. Procedure for waiver of notice.
81-66. Medical emergency exception.
81-67. Other exceptions.
81-68. Penalty.
81-68.1. Invalidity—Severability.
81-69. Repealer.
81-70. Effective date.

AN ACT relating to notice of abortions performed on minors and incompetents, and to repeal Section 3.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended. P.A. 83-890, veto overridden Nov. 2, 1983, eff. Jan. 31, 1984.

Ill. Rev. Stat. Ch. 38, ¶ 81-61 (1985)

81-61. Short title

§ 1. Short title. This Act shall be known and may be cited as the Parental Notice of Abortion Act of 1983.

Ill. Rev. Stat. Ch. 38, ¶ 81-62 (1985)

81-62. Legislative purpose and findings

§ 2. Legislative purpose and findings. (a) It is the intent of the legislature in enacting this parental notice provision to further the important and compelling State interests of: 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their household.

(b) The legislature finds as fact that: 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

Ill. Rev. Stat. Ch. 38, ¶ 81-63 (1985)

81-63. Definitions

§ 3. Definitions. For purposes of this Act, the following definitions will apply:

(a) "minor" means any person under the age of 18;

(b) "emancipated minor" means any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents;

(c) "actual notice" means the giving of notice directly, in person or by telephone;

(d) "abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth;

(e) "incompetent" means any person who has been adjudged a disabled person and has had a guardian appointed for her as provided under Section 11a-3(a)(1) or Section 11a-3(3) of the Probate Act of 1975.[1]

[1] Chapter 110½, ¶ 11a-3.

Ill. Rev. Stat. Ch. 38, ¶ 81-64 (1985)

81-64. Notice required

§ 4. Notice required. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician, hereinafter called the "referring physician", certifying that the referring physician or his agent has given such notice.

(b) If the minor's or incompetent's parents are divorced, or one parent is not available to the person performing the abortion or his agent or the referring physician or his agent in a reasonable time or manner, then notice to the parent with custody or to the parent who is available shall be sufficient. If neither parent nor the legal guardian is available to the person performing the abortion or his agent or the referring physician or his agent within a reasonable time or manner, notice to any adult person standing in loco parentis shall be sufficient.

(c) A minor or incompetent who objects to notice being given her parents or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement of this section pursuant to the procedures of Section 5 of this Act.[1]

[1] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-65 (1985)

81-65. Procedure for waiver of notice

§ 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent. These proceedings shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act[1] requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-66 (1985)

81-66. Medical emergency exception

§ 6. Medical emergency exception. The requirements of Section 4 of this Act[1] shall not apply when, in the best medical judgment of a physician based on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis of any medical judgment that warrants failure to give notice pursuant to this Act shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. Dissemination of this report shall comply with the reporting and confidentiality requirements of Section 10 of the Illinois Abortion Law of 1975.[2]

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-30 of this chapter

Ill. Rev. Stat. Ch. 38, ¶ 81-67 (1985)

81-67. Other exceptions

§ 7. Other exceptions. (a) When the parties to whom notice must be given pursuant to Section 4 of this Act[1] have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit signed notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply.

(b) Nothwithstanding any other provision of this Act, no notice need be given to any father of any minor requesting an abortion when the minor's mother accompanies her to the abortion and submits a notarized statement that she has been notified and, further, states orally to the physician or his agent that she has a reasonable belief that the fetus to be aborted is the child of the minor's father. Where the mother is deceased or otherwise unavailable, the physician or his agent may rely on a similar statement provided by any other adult relative accompanying the minor. Any physician or his agent relying on such a statement in good faith shall not be civilly or criminally liable under any provision of this Act for failure to give notice. Nothing in subsection (b) shall be construed to limit the alternative and additional right of a minor to seek a waiver of the notice requirement in accordance with Section 5[2] on the grounds that notice would not be in the best interests of the minor because the fetus to be aborted is the child of the minor's father.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-68 (1985)

81-68. Penalty

§ 8. Penalty. Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent, and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor.

Failure to provide persons with information pursuant to the requirements of this Act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

Such prima facie evidence shall not apply to any issue other than failure to inform the parents or guardian and interference with family relations in appropriate civil actions.

Ill. Rev. Stat. Ch. 38, ¶ 81-68.1 (1985)

81-68.1. Invalidity—Severability

§ 8.1. If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.

Added by P.A. 83-1128, § 3, eff. June 30, 1984.

Ill. Rev. Stat. Ch. 38, ¶ 81-69 (1985)

81-69. Repealer

§ 9. Section 3.3 of the "Illinois Abortion Law of 1975", veto overriden November 20, 1975, as amended,[1] is repealed.

[1] Paragraph 81-23.3 (repealed) of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-70 (1985)

81-70. Effective date

§ 10. This Act takes effect 90 days after it becomes a law.

SUPREME COURT OF THE UNITED STATES

No. 85-673

Neil F. Hartigan, Attorney General of the State of Illinois, etc., et al.,

Appellants

v.

David Zbaraz and Allan G. Charles, etc.

APPEAL from the United States Court of Appeals for the Seventh Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits which is limited to Question 1 presented by the jurisdictional statement.

October 14, 1986

APPELLANT'S

BRIEF

No. 85-673

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and **RICHARD M. DALEY**, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and **ALLAN G. CHARLES, M.D.**, individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR APPELLANT NEIL F. HARTIGAN

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APPEAL DOCKETED OCTOBER 16, 1985
JURISDICTION POSTPONED OCTOBER 14, 1986

QUESTIONS PRESENTED

1. Whether the Court of Appeals entered a final judgment for purposes of conferring jurisdiction on this Court under 28 U.S.C. § 1254(2) when it held unconstitutional two provisions of the Illinois Parental Notice of Abortion Act of 1983, severed them, and permanently enjoined their enforcement and when it enjoined the entire Act until such time as the Illinois Supreme Court promulgates rules to augment the Act's judicial by-pass procedures.

2. Whether Illinois may constitutionally impose a twenty-four hour waiting period, applicable only to minors, after notification of their parents but before an abortion is performed, where it also provides a judicial alternative to notification for mature minors and minors whose best interests are not served by notification.

PARTIES

The defendants below, Neil F. Hartigan, in his official capacity as Attorney General of the State of Illinois, his agents and successors, and Richard M. Daley, in his official capacity as State's Attorney for Cook County, Illinois, his agents and successors, and as the representative of all Illinois state's attorneys, are appellants herein. The plaintiffs below, David Zbaraz, M.D., and Allan G. Charles, M.D., on behalf of a class of physicians similarly situated, and on behalf of their minor patients, are appellees herein.

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I. THIS COURT HAS JURISDICTION OVER THE APPEAL UNDER 28 U.S.C. § 1254(2) BECAUSE THE COURT OF APPEALS ENTERED A FINAL JUDGMENT HOLDING THE ILLINOIS PARENTAL NOTICE OF ABORTION ACT REPUGNANT TO THE CONSTITUTION	18
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II.

ASSUMING *ARGUENDO* THAT JURISDICTION UNDER 28 U.S.C. § 1254(2) IS LACKING, THIS CASE PRESENTS UNSETTLED AND IMPORTANT QUESTIONS WHICH THE COURT SHOULD REVIEW BY GRANTING A WRIT OF CERTIORARI 34

III.

ILLINOIS MAY CONSTITUTIONALLY IMPOSE A SHORT WAITING PERIOD, APPLICABLE ONLY TO UNEMANCIPATED MINOR CHILDREN, AFTER PARENTAL NOTIFICATION BUT BEFORE AN ABORTION IS PERFORMED, WHEN IT ALSO PROVIDES A JUDICIAL ALTERNATIVE TO NOTIFICATION 36

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In The

Supreme Court of the United States

October Term, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and **RICHARD M. DALEY**, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and **ALLAN G. CHARLES, M.D.**, individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR APPELLANT NEIL F. HARTIGAN

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 763 F.2d 1532 (7th Cir. 1985). A copy of the opinion is included as Appendix A, at page App. 1 of the Appendix to the Jurisdictional Statement. The judgment order of the Court of Appeals is not reported, but is reprinted as Appendix C, at page App. 87 of the Appendix to the Jurisdictional Statement.

The memorandum opinion of the United States District Court for the Northern District of Illinois is reported at 585 F.Supp. 1452 (N.D. Ill. 1984). A copy of the memorandum opinion is included as Appendix B, at page App. 54 of the Appendix to the Jurisdictional Statement.

JURISDICTION

This action, brought under 42 U.S.C. § 1983, draws into question the constitutionality of the Illinois Parental Notice of Abortion Act of 1983. Invoking the jurisdiction of the District Court under 28 U.S.C. §§ 1331 and 1343, appellees filed a class action seeking declaratory and injunctive relief. On May 4, 1984, the District Court issued a memorandum opinion granting appellees' motion for summary judgment and permanently enjoining appellants from enforcing the Illinois Act. Judgment was entered on May 7, 1984. On June 6, 1984, appellants Hartigan and Daley filed their notices of appeal.

On appeal, the United States Court of Appeals for the Seventh Circuit also enjoined appellants from enforcing the Act. It found the Act constitutionally deficient in several respects. The Court held the twenty-four hour waiting period and a statutory exception to that requirement unconstitutional, severed those provisions, and struck them from the Act. It also ruled that the judicial by-pass procedures of the Act, standing alone, did not meet constitutional standards. However, it vacated the District Court's holding that the Act was unconstitutional and remanded the case for a determination of the constitutionality of the judicial by-pass procedures after the Illinois

Supreme Court promulgates rules to ensure expeditious and confidential waiver procedures. The judgment of the Court of Appeals was entered on May 20, 1985.

On August 8, 1985, appellant Hartigan filed a notice of appeal seeking review of that judgment in this Court (Appellant Hartigan's notice of appeal is reprinted as Appendix D, at page App. 89 in the Appendix to the Jurisdictional Statement). Appellant Daley filed a notice of appeal on August 19, 1985. They invoked the jurisdiction of this Court under 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I
U.S. CONST. amend. IV
U.S. CONST. amend. V
U.S. CONST. amend. IX
U.S. CONST. amend. XIV, § 1

(The text of these provisions is reprinted in the Appendix)

FEDERAL LAWS

28 U.S.C. § 1254

(The text of this statute is reprinted in the Appendix)

STATE LAWS

Illinois Parental Notice of Abortion Act of 1983, Ill. Rev. Stat. ch. 38, ¶¶ 81-61 *et seq.* (1985).

(The text of this statute
is reprinted in the Appendix)

STATEMENT OF THE CASE

On November 2, 1983, the Illinois General Assembly enacted the Parental Notice of Abortion Act of 1983, Ill. Rev. Stat. ch. 38, ¶¶ 81-61 *et seq.* (1985), overriding the veto of Governor James R. Thompson. The Act is designed to protect minors against their own immaturity, to foster and preserve the family structure, and to protect the rights of parents to rear their children. Ill. Rev. Stat. ch. 38, ¶ 81-62(a). The General Assembly concluded that those goals were worthy of protection in light of its findings that

> 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion.

Ill. Rev. Stat. ch. 38, ¶ 81-62(b).

In order to carry out the Act's purposes, Section 4(a) provides that actual notice[1] must be given to both parents[2] or, if applicable, to a legal guardian,[3] twenty-four hours before an abortion is performed upon an unemancipated minor. Ill. Rev. Stat. ch. 38, ¶ 81-64. Under Section 7(a), however, the waiting period need not be observed if both parents have been notified and they either accompany their child to the place where the abortion will be performed or submit signed, notarized statements indicating that they have been notified. Ill. Rev. Stat. ch. 38, ¶ 81-67(a).[4] The notice requirement may be waived altogether if the minor petitions the circuit court and demonstrates 1) that she is mature and sufficiently well-informed to make the abortion decision on her own, or 2) that notification would not be in her best interest. Ill. Rev. Stat. ch. 38, ¶¶ 81-64(c), 81-65(d).

Section 5 of the Act establishes judicial procedures for obtaining waiver of notification. Ill. Rev. Stat. ch. 38,

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[1] Actual notice is defined as "giving of notice directly, in person or by telephone." Ill. Rev. Stat. ch. 38, ¶ 81-63(c).

[2] Only the custodial parent need be notified if the parents are divorced. Similarly, if one parent is not available to the person required to give notice "in a reasonable time or manner", the available parent alone must be notified. Ill. Rev. Stat. ch. 38, ¶ 81-64(b). No notice to the minor's father is required if her mother accompanies her to the abortion, submits a notarized statement that she has received notice, and states orally that she has a reasonable belief that the fetus to be aborted is the child of the minor's father. Ill. Rev. Stat. ch. 38, ¶ 81-67(b).

[3] The Act also applies to persons who have been adjudicated incompetent. Ill. Rev. Stat. ch. 38, ¶¶ 81-63(e), 81-64. This discussion refers to minors only as they were the focus of the Court of Appeals' decision.

[4] The notification requirements do not apply when "a medical emergency exists that so complicates the pregnancy as to require an immediate abortion." Ill. Rev. Stat. ch. 38, ¶ 81-66.

¶ 81-65. The minor seeking the waiver must file a petition in the circuit court. The court is required to appoint a guardian *ad litem* and may appoint counsel if the applicant desires. Ill. Rev. Stat. ch. 38, ¶ 81-65(b).[5] Section 5(c) provides that court proceedings "shall be confidential and shall ensure the anonymity" of the applicant. Ill. Rev. Stat. ch. 38, ¶ 81-65(c). The circuit court must reach a decision within forty-eight hours of the filing of the petition, make specific factual findings and legal conclusions, and maintain a confidential record of the evidence. Ill. Rev. Stat. ch. 38, ¶ 81-65(f).

Under existing Illinois Supreme Court Rules, the appeal is docketed when the clerk of the reviewing court receives the notice of appeal. The circuit court is obliged to transmit the notice of appeal within five days of its having been filed. Ill. Sup. Ct. R. 303(a)(4) and (f). Ill. Rev. Stat. ch. 110A, ¶ 303(a), (f) (1985). Under Rule 311, the parties (in these cases, the minor) may request the appellate court to place the case on an accelerated docket in order to expedite disposition. Ill. Sup. Ct. R. 311. Ill. Rev. Stat. ch. 110A, ¶ 311 (1985).[6] Further, in Section 5(g), the Illinois Supreme Court "is respectfully requested to promulgate any rules and regulations necessary to ensure that

[5] Section 5(h) dispenses with filing fees. Ill. Rev. Stat. ch. 38, ¶ 81-65(h).

[6] Rule 311 provides:

> Any time after filing the docketing statement in the Appellate Court, the parties may agree to have their case placed on an accelerated docket. The agreement shall be in the form of a motion signed by an attorney for each party and may provide for submission of an agreed statement of facts in lieu of a record, and memoranda in lieu of formal briefs. The court may then enter an order setting forth an expedited schedule for the disposition of the appeal.

Ill. Rev. Stat. ch. 110A, ¶ 311 (1985).

proceedings under the Act are handled in an expeditious and confidential manner." Ill. Rev. Stat. ch. 38, ¶ 81-65(g).

Any person who "intentionally, knowingly, or recklessly" violates the Act's requirements is subject to penalties for a Class A misdemeanor. Failure to give notice constitutes prima facie evidence of "interference with family relations in appropriate civil actions." Ill. Rev. Stat. ch. 38, ¶ 81-68.

On January 26, 1984, before the effective date of the Act, appellees filed a class action in the United States District Court challenging a number of its provisions. (R. 1) Appellees, two physicians engaged in the practice of obstetrics and gynecology, individually and on behalf of a class of physicians and patients, sought declaratory and injunctive relief against Neil F. Hartigan, the Attorney General of the State of Illinois, and Richard M. Daley, the State's Attorney for Cook County, as the representative of a class of all Illinois state's attorneys. (R. 1, pp. 1-7)

At the outset of the litigation, the District Court entered a temporary restraining order prohibiting appellants from enforcing the Act. (R. 8; J.A. 1) That order was extended by agreement of the parties until the action was heard on the merits. (J.A. 1-2) The District Court also promptly certified plaintiff and defendant classes. (J.A. 14)

The plaintiff class is composed of all licensed physicians presently performing or desiring to perform abortions for unemancipated minors and disabled persons in Illinois and all unemancipated minors capable of giving informed consent to an abortion or whose best interest would not be served by notice to both parents. The defendant class consists of the state's attorneys of the various counties in Illinois. (J.A. 14-16)

In connection with their motion for injunctive relief, appellees submitted their own affidavits and the affidavits of two abortion counselors. (R. 5; J.A. 3-13) They believed that the twenty-four hour waiting period would increase the cost of the abortion, add to the minor's stress, and result in delays in excess of twenty-four hours. (J.A. 5, 7, 10-11, 13) They further felt that the waiting period added emotional and, in some cases, medical risks to the abortion procedure. (J.A. 7, 8, 11, 13) The physicians stated that this requirement was not medically justified and that it interfered with their professional relationships with their patients. (J.A. 5, 7, 8) For similar reasons, they also objected to the notification requirement. (J.A. 4, 5, 7, 9, 10, 12)

The counselors expressed their concerns about the workability of the judicial alternative to notification. They thought that it was "not a realistic option for minors seeking abortions unless the minor is provided with assistance in initiating the judicial process." They "fear[ed] that many minors who don't want one or both of their parents notified, and who aren't able to cope with 'petitioning the Circuit Courts,' may in despair end up waiting too long to have a safe abortion procedure and will either give birth to an unwanted child or will submit to an illegal and dangerous abortion procedure." (J.A. 10; *see also* J.A. 13)

The parties filed cross-motions for summary judgment. On May 4, 1984, the District Court issued a memorandum opinion in which it declared the Act unconstitutional and permanently enjoined appellants from enforcing it. (J.A. App. 54; 584 F.Supp. 1452)[7]

[7] The decisions of the District Court and the Court of Appeals are reproduced in the Appendix to the Jurisdictional Statement (hereinafter J.S. App. ____). Reference is made to the relevant page of that Appendix and to the reported decision.

Relying largely on the Seventh Circuit's earlier decision in *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) (*Pearson*), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (*Akron*), the District Court held the twenty-four hour waiting period unconstitutional. (J.S. App. 61-62; 584 F.Supp. at 1458-59) According to the District Court, this requirement unjustifiably burdened the minor's abortion decision because it increased the cost of the abortion and caused delay by "[t]he possible necessity" of making two trips to the abortion provider. (J.S. App. 62; 584 F.Supp. at 1458) While acknowledging that "the considerations with respect to minors are not identical with those applicable to adults," the District Court nonetheless relied upon *Akron*, to find that the waiting period did not further a legitimate state interest. (J.S. App. 62; 584 F.Supp. at 1459)

The District Court also ruled that the judicial alternative to notification did not adequately assure anonymous and expeditious proceedings for waiving notification. According to the District Court, Section 5 did not provide sufficient guarantees that an appeal from the denial of a minor's petition would be expedited or that the minor's anonymity would be protected in the trial court or on appeal.[8] (J.S. App. 65-67; 584 F.Supp. at 1460-61) Although the District Court upheld other portions of the Act, it refused to sever them, finding that the statute would have little operative significance without the invalidated pro-

[8] At the time the District Court ruled, Section 5(c) provided in part, "Court proceedings under this section shall be confidential. . . ." (J.S. App. 83) By the time the case reached the Court of Appeals, Section 5(c) had been amended, adding the requirement that court proceedings "ensure the anonymity of the minor." (J.S. App. 3, 10; 763 F.2d at 1535, 1542)

visions. (J.S. App. 72-73; 584 F.Supp. at 1464) The District Court, therefore, declared the entire Act unconstitutional and permanently enjoined its enforcement. (J.S. App. 77; 584 F.Supp. at 1467) It entered judgment on May 7, 1986. (R. 25; J.A. 3)

On June 6, 1986, appellants appealed to the United States Court of Appeals for the Seventh Circuit. (R. 27, 28) The Court of Appeals, by a divided vote, agreed with the District Court that the twenty-four hour waiting period violated a minor's right to obtain an abortion. It further ruled that an exception to the waiting period in Section 7(a) could not save that requirement from a constitutional attack and was itself invalid. Over the strident dissent of Judge Coffey, a majority of the panel struck down these portions of the Illinois statute. (J.S. App. 3-10; 763 F.2d at 1535-39) However, because the Act's essential purposes could be carried out without them, the majority concluded that these parts should be severed. It eliminated them from the Act and permanently enjoined them.

The majority also found that the judicial alternative to notification in Section 5 did not sufficiently ensure expeditious and anonymous court proceedings but, unlike the District Court, the majority did not definitively invalidate Section 5. Instead, it found that the section was "incomplete" until the Illinois Supreme Court promulgated rules for expedited appeals and for ensuring the confidentiality of the waiver proceedings. (J.S. App. 14, 19-20; 763 F.2d at 1541, 1543-44) Having severed the constitutionally offensive provisions, the majority vacated the holding that the entire Act was invalid, and remanded the case to the District Court for a determination of the constitutionality of the waiver of notice proceedings when the Illinois Supreme Court enacts supplemental rules.[9]

In striking down the twenty-four hour waiting period, the majority acknowledged that this Court's decision in *Akron*, which invalidated a waiting period imposed upon adults and children alike, "may not apply to minors." (J.S. App. 4; 763 F.2d at 1535) It recognized that "the minor's presumed inability to make important decisions in an informed, mature manner and the serious concerns implicated by a decision to have an abortion" gives rise to a significant state interest in promoting parental consultation. (J.S. App. 4-5; 763 F.2d at 1536) However, the majority also found that the constitutional rights of minors are subject to the same protection as the rights of adults and that the burdens imposed by a waiting period impacted both classes equally. Relying upon *Akron* and a number of lower court decisions, which had held waiting periods unconstitutional, the majority concluded that the waiting period in the Illinois Act imposed a direct and substantial burden upon a minor who seeks to obtain an abortion because it might increase the medical risks and cost of the procedure and might result in "additional mental anguish". (J.S. App. 5-7; 763 F.2d at 1536-37)

Based upon this determination, the majority required the State to establish that the waiting period was "narrowly drawn to further a compelling interest." (J.S. App. 7; 763 F.2d at 1537) Applying that standard, the majority found the waiting period to be broader than necessary to accomplish the objective of parental consultation. In its view, notice alone furthered that end because minor

[9] To date, the Illinois Supreme Court has not promulgated such rules.

children were "particularly susceptible to parental wishes." (J.A. App. 8; 763 F.2d at 1538) Since the notification requirement satisfied the State's interest, no additional measures could be taken to protect them. (J.S. App. 8; 763 F.2d at 1538)

Moreover, the majority of the panel decided that Section 7(a) did not offer an adequate exception to the waiting period requirement. (J.S. App. 8-10; 763 F.2d at 1538-39) Rather, the majority reasoned, that provision merely obliged the minor to comply with further requirements which increased the burden of obtaining an abortion and failed to "make a waiting period more efficacious in promoting parental consultation." (J.S. App. 10; 763 F.2d at 1539) Therefore, it could not be sustained.

Following *Bellotti v. Baird*, 443 U.S. 622, 651 (1979) (*Bellotti II*) and *Pearson*, the majority ruled that even in the context of a parental notice statute, Illinois was required to establish an alternative procedure through which a minor could show that she was mature or, even if immature, that an abortion was in her best interest. (J.S. App. 11; 763 F.2d at 1539) Although Section 5 of the Illinois Act provided for such procedures, the majority held that without additional, supplementing rules, those procedures could not be judged constitutionally sufficient in themselves. The majority refused to find that Illinois Supreme Court Rules 303 and 311 supplied the requisite assurance of expedited appeals to meet the constitutional standards articulated in *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 491 n.16 (1983) (*Ashcroft*), and *Bellotti II*, 443 U.S. at 644. (J.S. App. 16; 763 F.2d at 1542) While those rules "unquestionably give a minor seeking an abortion the opportunity to have an expeditious hearing," they could not "assure that such a hearing will occur." (J.S.

App. 16; 763 F.2d at 1542) Similarly, the majority concluded that the Act's provisions for protecting the minor's anonymity were inadequate, but incomplete. Those sections did not specify how the minor's identity would be safeguarded during the initial proceedings or afterwards. (J.S. App. 19-20; 763 F.2d at 1543-44)

Based on *Ashcroft*, *Pearson* and *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, ___ U.S. ___, 106 S.Ct. 2169 (1986), the majority decided that the Illinois Supreme Court should have an opportunity to enact rules before the entire Act was invalidated. The majority also considered the inability of the Illinois General Assembly to prescribe rules of appellate practice under the State Constitution. (J.S. App. 13; 763 F.2d at 1540) Thus, while the Act could not operate in compliance with constitutional standards without such rules and had to be enjoined, the majority declined to invalidate it conclusively. They therefore vacated the holding that the Act was unconstitutional, enjoined the statute, and remanded the case until the Illinois Supreme Court enacted rules for expeditious and anonymous proceedings and the District Court considered their constitutional sufficiency. (J.S. App. 23; 763 F.2d at 1545)

On August 8, 1985, appellant Hartigan filed his Notice of Appeal to the United States Supreme Court, seeking review of this decision under 28 U.S.C. § 1254(2). (J.S. App. 89)[10] On October 14, 1986, this Court entered an order postponing the question of jurisdiction until hearing of the case on the merits which is limited to Question 1 presented by the Jurisdictional Statement. (J.A. 26)

[10] Appellant Daley filed his Notice of Appeal on August 19, 1985.

SUMMARY OF THE ARGUMENT

A. Appellant is entitled to seek review of the judgment entered by the Court of Appeals by way of this Court's appeal jurisdiction under 28 U.S.C. § 1254(2). That judgment conclusively and unalterably struck down two provisions of the Illinois Parental Notice of Abortion Act of 1983 on the ground that they imposed an undue burden upon an unemancipated minor in exercising her constitutional right to have an abortion. Further, the Court entered an injunction prohibiting appellant from enforcing the Act until the Illinois Supreme Court enacts rules to supplement the judicial alternative through which a minor may seek a waiver of the Act's notification requirement. Although the Court of Appeals remanded a portion of the litigation to the District Court, its judgment is nevertheless final for two reasons.

First, by severing the statute and striking down the waiting period, the Court of Appeals effectively entered a separate and distinct judgment as to those portions of the Act. It finally determined the rights of the parties. With respect to those provisions, the litigation is ended, precluding the parties from obtaining additional relief or from seeking an alteration of that decision. *See City of Chicago v. Atchison, Topeka and Santa Fe Railway Co.*, 357 U.S. 77, 83 (1958). While a remand order accompanied the judgment, that order referred only to the very distinct question of the constitutional adequacy of Illinois Supreme Court rules which are not as yet in existence. Even if they were to be promulgated during the course of this appeal, any action that the District Court should take would have no bearing on the Court of Appeals' decision that the waiting period was invalid. Thus, there is no possibility that the constitutional issues presented by this judgment can be avoided and no danger that their resolution will be aided by additional factual development on remand. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 478-80 (1975); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971); *Radio Station WOW v. Johnson*, 326 U.S. 120, 126-27 (1945).

On the other hand, immediate review of this judgment may very well obviate further federal court entanglement in the State's legislative program and speed the final resolution of this litigation. *See City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973). The Illinois Act was enjoined even before it went into effect. The Illinois Supreme Court is aware of the history of this litigation. Its failure to promulgate additional, supplementary rules applicable to waiver of notice proceedings may depend upon its reluctance to interfere with ongoing federal litigation or its hope that forthcoming federal court pronouncements will eliminate, or at least clarify, its obligations.

The second reason why the Court of Appeals' judgment should be considered final is because, as a practical matter, it also ruled against the facial validity of the Act's by-pass procedures. Appellant may never be able to obtain review of its principal assertion that the Act and existing Illinois Supreme Court rules constitute a constitutionally adequate alternative to parental notice. *See Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852 (1984). Moreover, the injunction which the Court of Appeals entered against the Act and the remand order depend upon a future event. That event, however, will not alter its

decision that the by-pass procedures even in conjunction with existing rules do not comply with this Court's directives.

B. Even if the judgment is not final under 28 U.S.C. § 1254(2), appellant urges the Court to grant a writ of certiorari to review the Court of Appeals' decision pursuant to 28 U.S.C. § 2103 and 28 U.S.C. § 1254(1). This Court has never determined the constitutionality of a waiting period tied to a parental notice statute. As the Jurisdictional Statement demonstrates, resolution of that question may assist states in adopting measures short of consent which effectuate their interest in encouraging parental participation in minor children's abortion decisions.

C. By enacting a statute requiring a twenty-four hour wait between the time of notice and the time the abortion is performed, Illinois has attempted to offer a real and meaningful opportunity for parental consultation. It has done so in compliance with this Court's decisions in that it allows mature and best-interest minors to exempt themselves from both parental notice and the waiting period by invoking the judicial by-pass procedures set out in the Act. *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center For Reproductive Health, Inc.*, 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 433 U.S. 622 (1979) (*Bellotti II*). Having done so, Illinois is not required to narrowly tailor its statute to a compelling interest. It is sufficient that the waiting period furthers a significant state interest.

The decisions of this Court plainly establish that a state promotes such an interest when it provides the parents of a dependent minor an opportunity to participate in her decision to terminate her pregnancy. This interest is based

upon the concern that such an important decision is made in an informed manner with adult guidance and support and upon the important role that parents play in directing their child's upbringing. A waiting period tied to a parental notice requirement furthers those interests in ways that a mere notice requirement cannot. The waiting period ensures that the notice provided will in fact lead to a meaningful opportunity to discuss and analyze the many factors that inform the abortion decision.

On the other hand, a short waiting period does not impose an undue burden upon a minor in exercising her right to obtain an abortion. Unlike the consent requirement upheld in *Ashcroft*, it does not preclude the minor from carrying out her desire to terminate her pregnancy. Moreover, unlike the ordinance in *Akron*, the Illinois Act does not require that a minor incur additional expense or expend additional time in procuring her abortion because, by its terms, it does not require that the minor visit the abortion provider's facilities at any time except when she obtains the abortion.

In striking down the waiting period the Court of Appeals applied an incorrect standard and, consequently, erroneously concluded that Illinois could not further its significant interest by requiring this short wait. Appellant seeks reversal of that decision and dissolution of the injunction preventing him from enforcing the Illinois Act.

ARGUMENT

I.

THIS COURT HAS JURISDICTION OVER THE APPEAL UNDER 28 U.S.C. § 1254(2) BECAUSE THE COURT OF APPEALS ENTERED A FINAL JUDGMENT HOLDING THE ILLINOIS PARENTAL NOTICE OF ABORTION ACT REPUGNANT TO THE CONSTITUTION.

This Court's jurisdiction extends to appeals brought "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution." 28 U.S.C. § 1254(2).[11] *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, ___ U.S. ___, 106 S.Ct. 2718, 2722 (1986); *Malone v. White Motor Corp.*, 435 U.S. 497, 499 (1978); *Watson v. Employers Liability Assurance Corp., Ltd.*, 348 U.S. 66, 70 & n.7 (1954).

In this case, appellants are the chief law enforcement officers of the State of Illinois. Ill. Const. of 1970, Art. 5, § 15; Ill. Rev. Stat. ch. 14, ¶¶ 4, 5 (1985). They are impeded from carrying out their constitutional and statutory obligation to enforce the Illinois Parental Notice of Abortion Act of 1983 (hereinafter Illinois Act or Act) by the judgment of the Court of Appeals which invalidated two

[11] Section 1254 provides in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
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> * * *
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> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented. . . .

of its provisions and enjoined enforcement. That judgment rested solely upon the Court of Appeals' interpretation of constitutional principles governing a minor's right to obtain an abortion. (J.S. App. 1; 763 F.2d 1532) This Court's decisions make clear that when a court of appeals invalidates even portions of a state statutory scheme, its decision constitutes a holding of unconstitutionality within the meaning of 28 U.S.C. § 1254(2). *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 286 (1982); *Watson v. Employers Liability Assurance Corp., Ltd., supra*, 348 U.S. at 67; *cf. Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 929 (1983) (court of appeals' decision striking down § 244(c)(2) of the Immigration and Nationality Act constitutes "holding an Act of Congress unconstitutional" under 28 U.S.C. § 1252). This appeal, therefore, meets the jurisdictional prerequisites outlined in 28 U.S.C. § 1254(2).

Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, 106 S.Ct. 2169 (1986), infused an additional requirement into § 1254(2). The Court held that an appeal under that section will not lie "where the judgment is not final, and where the case is remanded for further development of the facts." 106 S.Ct. at 2176. Thus, an appeal under § 1254(2), like an appeal under a number of other jurisdictional statutes, is now predicated upon a finding of finality.[12]

[12] Two jurisdictional provisions, 28 U.S.C. § 1257, governing this Court's review of state court decisions, and 28 U.S.C. § 1291, governing court of appeals' review of district court decisions, historically have required a final judgment before an appeal may be taken. *See Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 1054 (1984); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-77 (1975); *Bachowski v. Usery*, 545 F.2d 363, 367-69 (3d Cir. 1976); *see also* 15 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE §§ 3906, 3908 (1976) [hereinafter 15 FED-

(Footnote continued on following page)

The finality rule in any context, however, has never been applied in a rigid or mechanical fashion. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). That rule does not necessarily require that the order appealed from be "the last order possible to be made in a case." *Gillespie v. United States Steel Corp., supra*, 379 U.S. at 152; *see also Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1952). Rather, its application takes into account "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Gillespie v. United States Steel Corp., supra*, 379 U.S. at 152-53 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). Thus, in numerous cases, this Court found that a judgment was final even when the court from which the appeal was taken contemplated further proceedings because overriding policies of judicial administration or federal-state relations presented

[12] *continued*
ERAL PRACTICE AND PROCEDURE]. While the concerns which inform the resolution of the finality issue under each of those statutes are not fully coterminous, the general policies underlying the finality rule apply in both contexts. *See* 15 FEDERAL PRACTICE AND PROCEDURE § 3908, at 435-36; 12 J. Moore, H. Bendix, B. Ringle, MOORE'S FEDERAL PRACTICE § 508.01[9], at 8-32 n.1, 8-33 (1982) [hereinafter 12 MOORE'S FEDERAL PRACTICE]. Indeed, this Court has often relied upon decisions interpreting one of these statutes to resolve a finality issue arising under the other. *See, e.g., Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 478 n.7; *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). And it has noted the "history of . . . the close relationship between § 1254(2) and § 1257." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 621 n.9 (1984) (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-77 n.11 (1974)); *see also City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (citing *Cox Broadcasting Corp.* when ruling on finality issue under § 1254(2)). Therefore, cases outlining the contours of the final judgment rule under these statutes are relevant to the determination of this Court's jurisdiction under § 1254(2).

themselves, *Mitchell v. Forsyth*, ___ U.S. ___, 105 S.Ct. 2806 (1985); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Local No. 438 Construction & General Laborer's Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963), because an important federal issue was likely to escape review, *Florida v. Meyers*, 466 U.S. 380, 104 S.Ct. 1852 (1984); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), or because substantial rights were in danger of being lost or irreparable injury was likely to result. *Mitchell v. Forsyth, supra*, 105 S.Ct. 2806; *Local No. 438 Construction & General Laborer's Union, AFL-CIO v. Curry, supra*, 371 U.S. 542; *Forgay v. Conrad*, 6 How. (47 U.S.) 201 (1848).

This flexible application necessarily dictates that the content of the litigation and the posture of the case on review must be examined in order to judge the real character of the judgment. *Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 479 n.8. When such an examination is made in this case, it is apparent that the judgment entered by the Court of Appeals represents a final resolution of the issues presented to it.

The present case came to the Court of Appeals from a final judgment of the District Court permanently enjoining appellants from enforcing the Illinois Act. The appeal, therefore, did not involve an interlocutory order or temporary determination of the issues. On review, the Court of Appeals also made conclusive rulings. It held that twenty-four hour waiting period in Section 4(a) of the Illinois Act unconstitutional. (J.S. App. 3-8; 763 F.2d at 1535-38) Further, it struck down an exception to that requirement in Section 7(a). (J.S. App. 8-10; 763 F.2d at 1538-39) Finding that the fundamental objectives of the Act could be carried out without these sections, the Court severed them, reading them out of the Act. (J.S. App. 21-23; 763 F.2d at 1545)

In addition, although the Court found that Section 5, providing a judicial alternative to notification, was "incomplete" until the Illinois Supreme Court enacted rules specifically governing expedited appeals and anonymous proceedings, it expressly rejected appellant's contention that the statute, along with existing rules of appellate practice, constituted the requisite "framework for a constitutionally sufficient means" of avoiding parental involvement in the minor's abortion decision. *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 491 n.16 (1983). (J.S. App. 14-17, 19-20; 763 F.2d at 1541-44) Based on its decision to allow the State Supreme Court an opportunity to enact rules, however, the Court of Appeals vacated the judgment holding the Act unconstitutional and remanded the case pending enactment of such rules and a determination of their constitutional adequacy. It enjoined the statute nevertheless.

A. The Court Of Appeals Conclusively Determined The Rights And Liabilities Of The Parties With Respect To The Twenty-Four Hour Waiting Period And The Exception To That Requirement In Section 7(a) Of The Act And Therefore Rendered A Final Judgment.

Even if the Court of Appeals' remand could be interpreted to defeat the finality of the judgment with respect to Section 5,[13] that decision has no bearing on the judgment declaring the waiting period and Section 7(a) unconstitutional. The judgment on these provisions is final even under the most rigid interpretation of the finality rule. *See Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final

[13] Appellant does not concede this point. The decision to prevent the Act from operating in conjunction with Illinois Supreme Court Rules 303 and 311, Ill. Rev. Stat. ch. 110A, ¶¶ 303, 311 (1985), was a definitive resolution of the facial validity of the Act for all practical purposes. *See* discussion at pp. 30-33 *infra*.

decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."). *See also City of Chicago v. Atchinson, Topeka and Santa Fe Railway Co.*, 357 U.S. 77, 83 (1958). As to those sections, the rights of the parties are conclusively determined. Appellant is forever foreclosed from enforcing Section 4's waiting period and Section 7(a); they remain perpetually enjoined. Appellees, on the other hand, cannot expect any additional relief. The determination of the constitutionality of those sections of the Act is not open to reexamination on remand. The remand order was confined to a constitutional evaluation of any rules of procedure the Illinois Supreme Court enacts to supplement Section 5 alone. Consequently, even if such rules are promulgated and appellant ultimately prevails in the District Court and on appeal, appellees will not be deprived of this favorable decision, nor will they be entitled to greater relief with respect to the waiting period. Quite simply, they have received all the relief they can ever expect as to that portion of the statute. That recovery, moreover, is completely independent of any additional relief they may seek or obtain on remand. *See Dickinson v. Petroleum Conversion Corp., supra*, 338 U.S. at 514-15; *Local P-171, Amalgamated Meat Cutters and Butcher Workmen of North America v. Thompson Farms Co.*, 642 F.2d 1065, 1070-71 (7th Cir. 1981) (Wisdom, S.J.).

The decision to sever these portions of the statute is significant. By severing them and confining the remand to an evaluation of State Supreme Court rules, the Court of Appeals recognized that any factual or legal matters related to the waiting period were not enmeshed with a determination of the constitutional adequacy of those rules. In order to reach this conclusion, the Court of Appeals had to find that the Act could operate without the waiting period and its exception and still achieve its essen-

tial objectives. *Immigration and Naturalization Service v. Chadha*, *supra*, 462 U.S. at 934-35. The Court expressly made that finding and deleted the provisions that it found offensive. (J.S. App. 22; 763 F.2d at 1545)

The District Court will not be required to take additional evidence relevant to those sections on remand and may not reevaluate their constitutionality. *See Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). Thus, there is no risk that this adjudication will be altered by new or additional facts or that the resolution of the issues presented will be changed thereby. Further, there is no potential that these issues will be mooted by any action the District Court subsequently takes on remand. *Cox Broadcasting Corp. v. Cohn*, *supra*, 420 U.S. at 478-80; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971); *Radio Station WOW v. Johnson*, 326 U.S. 120, 126-27 (1945); *Jack Walters & Sons, Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984); *A/S Apothekernes Laboratorium For Specialpraeparater v. I.M.C. Chemical Group, Inc.*, 725 F.2d 1140, 1143 (7th Cir. 1984).

On the other hand, unless this Court reviews the Court of Appeals' judgment at this point, appellant's opportunity to seek review may be forever foreclosed. *See Florida v. Meyers*, *supra*, 466 U.S. ____, 104 S.Ct. at 1853 n.*; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, *supra*, 414 U.S. at 163; *California v. Stewart*, decided with *Miranda v. Arizona*, 384 U.S. 436, 498 n.71 (1966). Since the District Court rendered a final judgment, appellant was obligated to seek review in the Court of Appeals within thirty days of its decision. 28 U.S.C. § 1291; Fed. R. App. P. 4(a)(1); *Browder v. Director, Department of Corrections*, 434 U.S. 257, 264 (1978). On appeal, this portion of the judgment was affirmed. (J.S. App. 10, 88; 763 F.2d at 1539) If the Illinois Supreme Court promulgates

rules and the District Court makes a determination as to their constitutionality, any appeal from such a decision will be confined to a review of the by-pass procedures. Regardless of which party prevails in the District Court, then, before the Seventh Circuit, appellant will not be able to challenge that Court's earlier judgment eliminating the waiting period and Section 7(a) from the Act. *Adams-Lundy v. Association of Professional Flight Attendants*, 792 F.2d 1368, 1371-72 (5th Cir. 1986); *Williams v. City of New Orleans*, 763 F.2d 667, 669 (5th Cir. 1985). Moreover, there is considerable doubt as to whether appellant will be allowed to appeal the earlier judgment in this Court. *See Dickinson v. Petroleum Conversion Corp.*, *supra*, 338 U.S. at 514-15; *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942); *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 417-18 (1923).

In summary, as the present appeal reaches the Court, entirely independent adjudications have been made on entirely separate portions of the litigation. Under these circumstances, the decision striking down the waiting period and Section 7(a) is a final, appealable judgment. Unless an appeal from that judgment is permitted, appellant's rights to seek review at a later date may be irretrievably lost. *See Gillespie v. United States Steel Corp.*, *supra*, 379 U.S. at 153; *Dickinson v. Petroleum Conversion Corp.*, *supra*, 338 U.S. at 514-15; *Radio Station WOW, Inc. v. Johnson*, *supra*, 326 U.S. at 126. *See also Sears, Roebuck & Co. v. Mackey*, *supra*, 351 U.S. 427.[14]

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[14] *Sears, Roebuck* and other decisions relied upon in this section involved appeals under 28 U.S.C. § 1291 from judgments of district courts entered pursuant to Fed. R. Civ. P. 54(b). The District Court's judgment in this case, in contrast, ended the litigation completely. However, the Court of Appeals modified it so as to create very separate and independent adjudications. There is, of course, no rule comparable to Rule 54(b) available to litigants in the courts

(Footnote continued on following page)

The policies promoted by disallowing piecemeal appeals will not be offended by this appeal. The order postponing the question of jurisdiction limited review to the first question posed by the jurisdictional statement. (J.A. 26) That question sought review of the Court of Appeals' determination that a waiting period applicable only to minors was unconstitutional. (J.S. i) Thus, the only question before this Court pertains to the judgment which is not subject to remand or reevaluation.

The conclusiveness of that judgment obviates any danger of duplicative efforts or interference with the important functions performed by the lower federal courts. Neither the District Court nor the Court of Appeals will

[14] *continued*
of appeals. Nonetheless, *Dickinson* and *Radio Station WOW* teach that a judgment which disposes of less than all of the claims of all of the parties may still be final even without the aid of such a provision. Indeed, it has been suggested that a similar approach should be followed even under 28 U.S.C. § 1257. *See* Dyk, *Supreme Court Review of State Court Decisions: "The Twilight Zone" of Finality*, 19 STAN. L. REV. 907, 939 (1967) [hereinafter *Supreme Court Review of State Court Decisions*].

Moreover, Rule 54(b) decisions are relevant to the finality issue presented here. Rule 54(b) does not dispense with the need for a final judgment. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 7 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 583 n.21 (1980). In fact, the rule embodies the policies underlying that requirement. 6 J. Moore, W. Taggart & J. Wicker, MOORE'S FEDERAL PRACTICE ¶ 54.33[2], at 54-194 n.26 (2d ed. 1986) [hereinafter 6 MOORE'S FEDERAL PRACTICE]. Rule 54(b) "merely administers [it] in a practical manner in multiple claims actions and does so by rule instead of judicial decision." *Sears, Roebuck Co. v. Mackey, supra*, 351 U.S. at 438. In this sense, that Rule, like this Court's interpretation of finality, represents an aspect of federal judicial administration. 12 MOORE'S FEDERAL PRACTICE ¶ 508.01[9], at 8-33; 15 FEDERAL PRACTICE AND PROCEDURE § 3909, at 452. The interest in efficient and just resolution of federal litigation upon which Rule 54(b) is founded surely extends to this case which proceeded through the federal court system from its inception.

be obliged to reacquaint itself with the facts and law applicable to these issues. The issues on remand will focus on the entirely separate matter of determining the constitutionality of supplementary rules. If that determination is appealed, it will not encompass questions of fact and law relevant to the constitutionality of the waiting period or Section 7(a). *See Curtiss-Wright Corp. v. General Electric Co., supra*, 446 U.S. at 8; *Local P-171, Amalgamated Meat Cutters and Butcher Workmen of North America v. Thompson Farms Co., supra*, 642 F.2d at 1070. Therefore, to the extent that the finality rule seeks to preserve the unique contributions of each of the lower federal courts, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), their roles have been fully carried out in this case and will not be undermined by this Court's appeal jurisdiction.

On the other hand, the need to review this judgment will never be eliminated. *Organization For A Better Austin v. Keefe, supra*, 402 U.S. 415; *Mills v. Alabama*, 384 U.S. 214 (1966). If the Illinois Supreme Court were to promulgate rules which are upheld by the Court of Appeals, appellant would still wish to challenge the determination that the waiting period and Section7(a) are unconstitutional. It is true that there would be no need for this appeal if review were postponed until the conclusion of the entire litigation. However, there are other important, countervailing values involved here that far outweigh any possible savings of time and effort.[15]

Refusal to consider this judgment immediately implicates fundamental comity concerns. Most obviously, this judg-

[15] Of course, it is not certain that a future appeal will ever materialize. If no appeal is taken, postponing review will serve no purpose but delay.

ment prevents the State from giving effect to legislation that was popularly supported and duly enacted by the Illinois General Assembly.[16] *See City of New Orleans v. Dukes, supra,* 427 U.S. at 302. But that is not all. The continuation of this litigation may very well obstruct efforts of the Illinois Supreme Court to promulgate the supplementing rules that the Court of Appeals exacted.

The Illinois Act has been embroiled in federal litigation and the subject of some form of injunction since before its effective date. The State Supreme Court is aware of the action taken by the lower federal courts and of the fact that the case is currently pending in this Court. In light of these facts, the Illinois Supreme Court might have been reticent to take any action that would interfere with the orderly conduct of the federal litigation. It could easily have concluded that the most responsible and efficient course would be to await final resolution of the constitutional issues before proceeding to promulgate rules.

In this regard, it must be borne in mind that the appeal to this Court sought review of all of the issues which the Court of Appeals resolved. Among them was the question of whether, on its face and in conjunction with currently existing Illinois rules of practice, the Act provided a constitutionally sufficient framework for ensuring confidential and anonymous procedures for waiving parental notice. (J.S. App. 21-24) The Illinois Supreme Court, therefore, could have considered that any efforts expended to consider additional, specific rules would be wasted depending on the outcome of this appeal. It might have believed also that this Court's pronouncement on those issues would provide guidance to it in drafting such rules.

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[16] The Act passed by an overwhelming majority originally and after the Governor's veto. (J.S. App. 77 n.4; 584 F.Supp. at 1456 n.4)

The Court's order of October 14, 1986, limiting review to the first question presented by the jurisdictional statement, indicates that the issues related to the by-pass procedures will not be considered. However, continued litigation of this Act may still obstruct the ability of the Illinois Supreme Court to ascertain what action is required or even permitted. If the Court declines review of the case at this juncture and it is returned to the District Court, the issues related to the waiting period and Section 7(a) will remain unresolved by the highest court in which review is available and, assuming one is available, subject to a later appeal. The prospect of ongoing litigation may deter the State Supreme Court from taking any action, placing this legislation in perpetual limbo. On the other hand, if this Court reviews the judgment now, the only part of the case that will remain after its decision will depend clearly and directly upon state court action. As a result, the Illinois Supreme Court will be able to discern its responsibilities and the scope of its power unfettered by the prospect of further federal interpretaton.

This Court has always been mindful of the hardships that accompany delayed review. *See, e.g., Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469; *Gillespie v. United States Steel Corp., supra,* 379 U.S. 148; *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). Its sensitivity in this area has consistently been heightened when, as here, the delay leaves unsettled the appropriate course of future state court action, poses the potential for the unnecessary expenditure of state resources or protracted interference with legislative programs, or leaves important federal questions unresolved. *See, e.g., City of New Orleans v. Dukes, supra,* 427 U.S. 297; *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., supra,* 414 U.S. 156; *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963); *see also,* 16 C.

Wright, A. Miller, E. Cooper and E. Gressman, FEDERAL PRACTICE AND PROCEDURE § 4008, at 567 & n.5 (1977). The Court of Appeals' decision holding the waiting period and Section 7(a) unconstitutional constitutes a definitive and complete resolution of the parts of the Act which are currently severed and not before the District Court on remand. Immediate review will not undercut the salutary objectives of the finality rule. Accordingly, the judgment entered by the Court of Appeals invalidating those provisions is final and an appeal to this Court is authorized under 28 U.S.C. § 1254(2).

B. The Court Of Appeals' Decision Is A Final Resolution Of The Facial Validity Of Section 5 For All Practical Purposes And Therefore Constitutes A Final, Appealable Judgment.

Relying on this Court's willingness to presume that state courts would act in accordance with constitutional pronouncements, *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 491 n.16 (1983), appellant's principal contention in the Seventh Circuit was that the Illinois Act on its face "provides the framework for a constitutionally sufficient means" of ensuring confidential and expeditious court proceedings. *Id.* In addition, appellant pointed out that the Act must be read with currently existing Illinois Supreme Court Rules 303 and 311, Ill. Rev. Stat. ch. 110A, ¶¶ 303, 311 (1985), and that together they offered a minor whose waiver petition was denied an effective opportunity to appeal. Appellant urged the Court to allow this scheme to operate at least until such time as the need for more specific rules became apparent.

The Court of Appeals rejected these arguments. (J.S. App. 14-16; 763 F.2d at 1541-42) While it found the Act to be "incomplete" without these rules, it ruled that their

absence was a "fundamental defect in Section 5." (J.S. App. 14; 763 F.2d at 1541) As a result, it continued the injunction prohibiting enforcement of the Act. (J.S. App. 23; 763 F.2d at 1545)

On appeal to this Court, appellant contested the correctness of this ruling. (J.S. 21-24) Although the Court's order of October 14, 1986 forecloses review of that decision, it does not necessarily determine the question of the finality of the judgment. Ordinarily, the character of the judgment as final or interlocutory depends upon the posture of the case at the time review is sought. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). While, on rare occasion, parallel proceedings in other courts have been found to affect the nature of the appealed order, *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277 (1980), no such action has been taken here. Perhaps influenced by its interpretation of the Act and its own existing rules as mandatory in this context as well as the other factors previously discussed, (p. 28 *supra*) the Illinois Supreme Court has taken no action which would influence the conclusiveness of the Court of Appeals' decision.

That decision, nevertheless, is a final determination of the facial validity of the Act in any pragmatic sense. By rejecting appellant's arguments and enjoining enforcement, the decision makes the Act inoperable until the Illinois Supreme Court takes some further action. With the case in this posture, appellant could be prevented from ever obtaining review of this aspect of the Court of Appeals' decision on the constitutionality of Section 5. If supplementary rules are promulgated and their constitutionality is upheld, appellant will lose his right of appeal under § 1254(2) which is limited to cases in which a court of appeals holds a statute *invalid*. Even if the rules do not survive a constitutional challenge, the decision that Sec-

tion 5 is unconstitutional without them may be mooted. *See Florida v. Meyers, supra,* 466 U.S. ____, 104 S.Ct. at 1853 n.*; *California v. Stewart, supra,* 384 U.S. at 498 n.71; *see also Ringsby Truck Lines, Inc. v. United States,* 490 F.2d 620, 624 (10th Cir. 1974), *cert denied sub nom. Ringsby Truck Lines, Inc. v. National Small Shipments Traffic Conference, Inc.,* 419 U.S. 833 (1974).

It is also significant that an injunction continues to run against the Act. It obliges appellant to comport with its terms even if it later turns out that the decree was erroneously entered. *Pasadena City Board of Education v. Spangler,* 427 U.S. 424, 439 (1976). The extraordinary burdens that an erroneous injunction imposes necessitates an especially flexible finality requirement in order to prevent irreparable injury or undue prejudice. *See, e.g., Organization For A Better Austin v. Keefe, supra,* 402 U.S. at 418 n.1; *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry, supra,* 371 U.S. 542. *See generally* 15 FEDERAL PRACTICE AND PROCEDURE § 3908, at 437; *Supreme Court Review of State Court Decisions,* 19 Stan. L. Rev. at 940.

In this case, the injunction entered against the Illinois Act is only interlocutory in the sense that its continued existence depends upon whether the circumstances giving rise to its issuance change or remain static. The Court of Appeals reviewed a final judgment of the District Court. It never left open for reconsideration or receipt of addition evidence the question whether the Act could take effect as written without the promulgation of specific state court rules. Thus, the character of the injunction entered is much more akin to a permanent injunction which always remains subject to modification or dissolution depending upon changed circumstances. *United States v. United Shoe Machinery Corp.,* 391 U.S. 244 (1968); *System Federation No. 91, Railway Employees Department, AFL-CIO v. Wright,* 364 U.S. 642 (1961); *American Horse Protection Association v. Watt,* 694 F.2d 1310 (D.C. Cir. 1982). The alterability of the remedy, however, does not affect the finality of the order in which it is awarded. *See St. Louis, I.M.&S. Railway Co. v. Southern Express Co.,* 108 U.S. 24, 29 (1883); *Hameetman v. City of Chicago,* 776 F.2d 637, 641 (7th Cir. 1985); *University Life Insurance Company of America v. Unimac Ltd.,* 699 F.2d 846, 849 (7th Cir. 1983).

For these reasons, this case is very different from *Thornburgh v. American College of Obstetricians and Gynecologists, supra,* 106 S.Ct. 2169, which came to this Court fragmented and incomplete. Unlike this case, *Thornburgh* involved an appeal from an interlocutory order ruling on a motion for a preliminary injunction. Here, the District Court's judgment was uncontestably final. In *Thornburgh,* the Third Circuit contemplated further factual development when it returned the case to the District Court. Thus, in addition to requiring review of state court rules, a determination largely raising questions of law, in *Thornburgh* the District Court was required to hear testimony and resolve questions of fact. 106 S.Ct. at 2182 n.12. Moreover, it appears that Pennsylvania, unlike Illinois, did not vigorously press the claim that currently existing statewide rules in combination with the statute complied with the constitutional requirements set by this Court.[17] In

[17] One Pennsylvania county had promulgated a rule on its own and the then Chief Justice of the Common Pleas Court had suggested in a letter that the courts could apply adoption rules "if applicable." *American College of Obstetricians and Gynecologists v. Thornburgh,* 737 F.2d 283, 297 (3d Cir. 1984), *aff'd,* ____ U.S. ____, 106 S.Ct. 2169 (1986). That situation is quite different from the one presented in this case where Illinois Supreme Court Rules 303 and 311, Ill. Rev. Stat. ch. 110A, ¶¶ 303, 311 (1984), which currently exist, require the appeal from the denial of a waiver peti-

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light of these substantial differences, the ruling in *Thornburgh*, that a final judgment was lacking, simply does not compare with the character of the judgment that the Seventh Circuit entered in this case.

In conclusion, this Court has jurisdiction of this appeal under 28 U.S.C. § 1254(2). The Court of Appeals' judgment definitively decided the parties' rights and liabilities with respect to the facial validity of the Illinois Act. Even if the remand is construed to impair the finality of one portion of the decision, however, it can have no effect upon the conclusiveness of the judgment holding unconstitutional the waiting period and Section 7(a). At least with respect to those provisions, the judgment is final by any accepted definition.

II.

ASSUMING *ARGUENDO* THAT JURISDICTION UNDER 28 U.S.C. § 1254(2) IS LACKING, THIS CASE PRESENTS UNSETTLED AND IMPORTANT QUESTIONS WHICH THE COURT SHOULD REVIEW BY GRANTING A WRIT OF CERTIORARI.

Even if the Court were to decide that the judgment is not final and that § 1254(2) does not permit an appeal, it should review the Court of Appeals' decision by granting a writ of certiorari. When an appeal is improvidently taken, Congress has directed the Court to regard the appeal papers as a petition for certiorari and to act upon them "as if duly presented . . . at the time the appeal was taken." 28 U.S.C. § 2103. The absence of a final judgment is not an impediment to the exercise of certiorari

[17] *continued*
tion to be docketed within five days of the filing of the notice of appeal and which permit the minor to take steps to expedite the appeal.

jurisdiction when the writ is directed to a federal court of appeals. 28 U.S.C. § 1254(1). Indeed, on numerous occasions, this Court has reviewed decisions of the court of appeals which were clearly interlocutory or which raised substantial doubt about the finality of the appealed order. *See, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, 106 S.Ct. 2169, 2175-76 (1986); *City of Renton v. Playtime Theatres, Inc.*, ____ U.S. ____, 106 S.Ct. 925, 927 n.1 (1986); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927-28 (1975); *City of El Paso v. Simmons*, 379 U.S. 497, 502-503 (1965).

The jurisdictional statement fully demonstrates the significance of the constitutional issues raised in this case. By invalidating a short waiting period linked directly to parental notification, the Court of Appeals did not heed this Court's teachings in *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983). (J.S. App. 12-13) It restricted Illinois' ability to provide an avenue for meaningful parental consultation in a manner less burdensome than by requiring consent. Its decision not only obstructs the significant and legitimate interest of the State in ensuring that its minor citizens make important decisions with adult guidance, but also undermines the right of parents to nurture and care for their children and participate in their upbringing. (J.S. App. 14-16) While the Seventh Circuit is not alone in its interpretation of the constitutionality of similar provisions, this interpretation is not universally shared by the lower federal courts. (J.S. App. 8-9)[18]

[18] The decision in *Hodgson v. Minnesota*, No. 3-81-CIV 538 (D. Minn. March 22, 1982), has been superseded by a later decision in that case. On November 6, 1984, the District Court ruled that Minnesota's forty-eight hour waiting period unduly burdened a minor's right to obtain an abortion in light of the facts before it.
(Footnote continued on following page)

In addition to these reasons, immediate review of this case may very well expedite the progress of this litigation. *See* pp. 28-29 *supra*. Further, prompt adjudication will clarify the scope and content of the role of the Illinois Supreme Court and may lead to less federal court entanglement in the State's statutory program. For all of these reasons and for the reasons set forth in the Jurisdictional Statement, appellant respectfully requests this Court to grant a writ of certiorari if it should find that jurisdiction is absent under 28 U.S.C. § 1254(2).

III.

ILLINOIS MAY CONSTITUTIONALLY IMPOSE A SHORT WAITING PERIOD, APPLICABLE ONLY TO UNEMANCIPATED MINOR CHILDREN, AFTER PARENTAL NOTIFICATION BUT BEFORE AN ABORTION IS PERFORMED, WHEN IT ALSO PROVIDES A JUDICIAL ALTERNATIVE TO NOTIFICATION.

This case presents a question of means. The State of Illinois seeks to secure parental involvement in the abortion decision of a minor child who is still dependent upon her parents for their care and support by requiring a

[18] *continued*
However, it found that a shorter waiting period could survive a constitutional challenge observing that "a notification requirement would be an empty formalism without practical effect if the abortion could proceed before the parental consultation could take place." *Hodgson v. Minnesota*, No. 3-81-CIV 538, *slip op.* at 54-55 (D. Minn. November 6, 1986), *appeal docketed* No. 86-5423 (8th Cir. November 18, 1986) (appeal of State of Minnesota) (plaintiffs' cross appeal filed November 24, 1986), *cert. petition filed*, No. 86-882 (U.S. Sup. Ct. November 28, 1986). *See also Akron Center for Reproductive Health, Inc. v. Rosen*, 633 F. Supp. 1123, 1138-39 (N.D. Ohio 1986), *appeals docketed sub nom. Akron Center for Reproductive Health v. Slaby*, No. 86-3664 (6th Cir. July 18, 1986) (appeal of State of Ohio), No. 86-3717 (6th Cir. August 4, 1986) (appeal of defendant Slaby) (upholding Ohio's twenty-four hour waiting period).

twenty-four hour wait between the time her parents are notified and the time the abortion is performed. A divided panel of the Court of Appeals held that this measure swept too broadly. Its decision is inconsistent with *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) (*Ashcroft*); *City of Akron v. Akron Center For Reproductive Health, Inc.*, 462 U.S. 416 (1983) (*Akron*); *H.L. v. Matheson*, 450 U.S. 398 (1981) (*Matheson*); *Bellotti v. Baird*, 433 U.S. 622 (1979) (*Bellotti II*). It rests upon a flawed interpretation of constitutional doctrine and fails to accommodate all of the interests which underlie the State's permissible objective.

A. The State Of Illinois Is Not Required To Narrowly Tailor Its Statute Regulating Abortions For Minor Children To A Compelling State Interest Because It Allows Them To Avoid Both Parental Notice And The Waiting Period By Invoking The Judicial By-Pass Procedures.

The State of Illinois has a legitimate and important interest in encouraging parental participation in an unemancipated minor's decision to have an abortion. *Ashcroft*, *supra*, 462 U.S. at 490-91; *Akron*, *supra*, 462 U.S. at 427 n.10; *Matheson*, *supra*, 450 U.S. at 409-410; *id.* at 420-25 (Stevens, J., concurring in the judgment); *Bellotti II*, *supra*, 433 U.S. at 635-39; *id.* at 656-57 (White, J., dissenting).[19] The state may promote that interest by requiring parental notice and even consent before an abortion is per-

[19] *See also Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 91-92 (1976) (Stewart, J., concurring) (approving goal of parental involvement, but disapproving absolute parental veto in all cases); *id.* at 95 & n.2 (White, J., concurring in the judgment in part and dissenting in part) (recognizing power of state to require parental involvement and consent); *id.* at 102-105 (Stevens, J., concurring in part, dissenting in part) (approving of state's encouragement of parental involvement).

formed on their immature, dependent daughter. *Ashcroft, supra*, 462 U.S. at 490-91; *Akron, supra*, 462 U.S. at 439; *Matheson, supra*, 450 U.S. at 409; *see also Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1009-11 (1st Cir. 1981); *H.B. v. Wilkinson*, 639 F.Supp. 952, 953 (D. Utah 1986); *Akron Center for Reproductive Health, Inc. v. Rosen*, 633 F.Supp. 1123, 1131 (N.D. Ohio 1986), *appeals docketed sub nom. Akron Center for Reproductive Health, Inc. v. Slaby*, No. 86-3664 (6th Cir. July 18, 1986) (appeal of State of Ohio), No. 86-3717 (6th Cir. August 4, 1986) (appeal of defendant Slaby).

The Court of Appeals recognized this and upheld the notice provision because the State also established a procedure by which mature and best-interest minors could exempt themselves from parental involvement. (J.S. App. 23, 52; 763 F.2d at 1545, J.S. App. 52-53; 763 F.2d at 1560 (Coffey, J., dissenting)) A majority of the panel ruled, however, that the State's interest in encouraging parental participation could not support a short waiting period. According to the majority, notice alone "should lead to parental consultation without the state's additional help." (J.S. App. 8; 763 F.2d at 1538 (quoting *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983)) Since notification was the narrowest means to achieve that objective, Illinois was not permitted to foster it by adding a waiting period.

In reaching that conclusion, the majority found that a short waiting period imposed a "direct and substantial burden" on a minor seeking an abortion. (J.S. App. 7; 763 F.2d at 1537) Borrowing facts from *Akron* and other decisions invalidating waiting periods, which for the most part also applied to adult women, the majority reasoned that the waiting period would increase the costs and inconvenience of the abortion procedure and produce greater medical risks, stress, and mental anguish. The State of

Illinois, therefore, was required to prove that its regulation was "narrowly drawn to further a compelling state interest." (J.S. App. 7; 763 F.2d at 1537) (quoting *Charles v. Carey*, 627 F.2d 772, 785 (7th Cir. 1980)). According to the majority, Illinois could not sustain this burden because its admittedly important interest would be protected by parental notice. Thus, once notice occurred, the State's interest was exhausted.

What the majority failed to recognize is that by providing a by-pass procedure so that mature and best-interest minors could exempt themselves from this regulation, Illinois did narrowly tailor its regulation in compliance with this Court's mandates. *See Ashcroft, supra*, 462 U.S. at 490; *Akron, supra*, 462 U.S. at 427 n.10, 439-40; *Bellotti II, supra*, 443 U.S. at 643-44. The State is not constitutionally required, however, as the majority insisted, to meet such exacting standards with respect to general regulatory measures that confine themselves to setting requirements for minors' abortions.

It is well settled that the state is accorded broad authority to regulate the activities of minors even when the regulation touches upon or hinders rights that an adult could freely exercise without state interference. *Compare Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 67-72 (1976) (*Danforth*) (striking down spousal consent requirement for adult women) *with Ashcroft, supra*, 462 U.S. at 490-92 (upholding parental consent requirement for minors when judicial alternative provided). *See also Carey v. Population Services International*, 431 U.S. 678, 692-93 & n.15 (1977) (plurality opinion); *id.* at 709-10 (Powell, J., concurring opinion); *Ginsberg v. New York*, 390 U.S. 629, 638 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 167-68 (1944). This greater regulatory latitude is premised upon the presumption that children are less capable of making important decisions and also upon the pivotal role of parents

in rearing their children as they see fit. *Bellotti II, supra,* 443 U.S. at 635-39; *Carey v. Population Services International, supra,* 428 U.S. at 693 n.15.

Mindful of these important and sometimes competing interests, this Court has not required states to meet the *compelling* interest standard when its laws are directed at the activities of minors. Rather, it is sufficient that the state demonstrate a *significant* interest that is not present for adults. *Akron, supra,* 462 U.S. at 427 n. [illegible] *son, supra,* 450 U.S. at 411; *Carey v. Population Services International, supra,* 431 U.S. at 693 & n.15; *id.* at 703-706 (Powell, J., concurring); *Danforth, supra,* 428 U.S. at 74-75. Moreover, the Court has permitted the state to select measures that may reach wider than necessary or fall short of fully protecting its asserted interest.

Thus, in *Ashcroft* the State of Missouri permissibly selected parental consent as a means of inducing parental involvement even though mere notice might have fulfilled that objective. In *Matheson,* Utah's notice statute withstood a constitutional challenge even though it could not guarantee that parents would supply their daughters with helpful information and even though the statute did not ensure that notice alone would permit a real opportunity for discussion. It was enough, the Court observed, that the statute was "reasonably calculated to protect minors in appellant's class by *enhancing the potential* for parental consultation." 450 U.S. at 412 (emphasis added); *see also id.* at 425 (Stevens, J., concurring in the judgment) (the state may select "a yardstick based upon the chronological age of an unmarried pregnant woman. That this yardstick will be imprecise or even unjust in particular cases does not render its use by a state legislature impermissible under the Federal Constitution.").

These decisions demonstrate that when the state regulates a minor's activities, including her decision to have

an abortion, it may rely on a presumption that her interests are more effectively safeguarded by allowing parents some participation and control. What the state may not do is make that presumption irrebutable in all cases. Consequently, under *Ashcroft* and *Bellotti II,* the minor must be able to show that parental involvement, in her individual circumstances, is either 1) unnecessary because she is mature enough to make her own decision or 2) undesirable because her parents' participation is adverse to her best interest. So long as the state provides an avenue for a minor to take herself out of the category created by the statute, its provisions are subject to the more lenient scrutiny normally applied to laws regulating minors' activities, including those that implicate sensitive constitutional concerns.

The Illinois Act complies with these directives. The Act does not even purport to regulate adult women or to interfere with their abortion decisions. It does not extend to persons who are eighteen or older. It does not reach girls who are younger, but no longer dependent upon their parents for maintenance or support. Rather the Act is intended to facilitate parental involvement only when the child is subject to her parents' care, custody, and control. Ill. Rev. Stat. ch. 38, ¶¶ 81-63(a), (b), 81-64(a).

Moreover, the Illinois Act establishes a method whereby a girl younger than eighteen may make the abortion decision on her own if she can demonstrate to a court that she is mature or that parental notification would not be in her best interests. She is assisted in pursuing this option by a guardian *ad litem,* a court appointed counsel, and a dispensation from filing fees. The minor is entitled to appeal from an adverse decision of the circuit court on these issues. Ill. Rev. Stat. ch. 38, ¶ 81-65. If the parents have been notified of the impending abortion and they either accompany their daughter or send signed,

notarized statements indicating that they have been notified, the abortion may proceed. No waiting period attaches. Ill. Rev. Stat. ch. 38, ¶ 81-66.

The waiting period is directly tied to the requirement of parental notification. It imposes no impediment to a minor who convinces a court that she is mature and capable of making the abortion decision on her own. It does not jeopardize her safety or welfare. She need not wait twenty-four hours if a court determines that parental notification is not in her best interest or if her medical needs require an immediate abortion. The waiting period may be avoided if notice has been effectuated and some reliable indication of that fact exists in the form of the parents' presence at the abortion or their notarized statements. In short, the Illinois Act is molded to afford protection for the minor child's constitutional right while at the same time providing the family a meaningful opportunity for consultation and discussion before the minor makes the serious and irrevocable decision to terminate her pregnancy.

By relying on an incorrect standard and by failing properly to consider the role of the by-pass procedures, the majority also incorrectly analyzed the constitutionality of Section 7(a). That provision was intended as an aid to minors who had consulted with their parents and who wished to proceed with an abortion immediately. Contrary to the majority's reasoning, Section 7(a) does not increase the burdens of obtaining an abortion because it imposes no additional requirements upon the minor. It merely allows her to free herself from a short wait if she makes other arrangements in compliance with that section.

B. The Twenty-Four Hour Waiting Period Promotes Significant And Fundamental State And Parental Interests.

By invalidating the waiting period, the majority unjustifiably hampered Illinois' ability to give substance to the purposes underlying the notice requirement. It failed to weigh correctly Illinois' interest in ensuring that its minor citizens make important decisions in an informed manner with adult guidance as well as parents' interest in supervising and directing the upbringing of their children. The majority prohibited the State from selecting means that would most effectively promote these interests and did so without an adequate showing that the waiting period unduly burdened the minor's right to have an abortion.

The articulated objectives of the Illinois Act are to protect minors from their own immaturity, foster the family structure and preserve it as a viable social unit, and to protect the rights of parents to rear children who are members of their household. Ill. Rev. Stat. ch. 38, ¶ 81-62(a). The significance of these objectives is unassailable.

The State's interest in protecting the health and welfare of its young citizens is well trenched in history and tradition. It has been embodied in a host of laws that are designed to safeguard children from the consequences of improvident decisions. *See Matheson, supra*, 450 U.S. at 421-22 (Stevens, J., concurring in the judgment). In Illinois, for example, children are not permitted to make binding contracts, *Deatheridge v. Lewis*, 131 Ill.App.3d 685, 691, 475 N.E.2d 1364, 1367 (1985), to be employed in designated occupations, Ill. Rev. Stat. ch. 23, ¶ 2351 (1985); Ill. Rev. Stat. ch. 96½, ¶ 4244 (1985), or to purchase certain materials that are judged harmful to their well-being. *See, e.g.*, Ill. Rev. Stat. ch. 23, ¶ 2357 (1985) (cigarettes); Ill. Rev. Stat. ch. 23, ¶ 2373 (1985) (reading materials); Ill. Rev. Stat. ch. 43, ¶ 131 (1985) (alcohol). Often, these protective measures are carried out by deferring to paren-

tal judgment. *See, e.g.*, Ill. Rev. Stat. ch. 23, ¶ 2357 (1985) (parental consent for purchase of cigarettes); Ill. Rev. Stat. ch. 40, ¶ 203 (1985) (parental consent for marriage); Ill. Rev. Stat. ch. 111, ¶ 4502 (1985) (parental consent for medical treatment).[20] *See also Bellotti II*, 443 U.S. at 637; *Parham v. J.R.*, 424 U.S. 584, 602 (1979).

State imposed restrictions on the activities of children are justified by children's special vulnerability. Unlike adults, minor children are not presumed to be able to make informed and mature choices. They are not expected to assess the consequences of those choices with the aid of experience, perspective, and seasoned judgment, so the State may protect them from immediate and future harm It may eliminate for them obstacles to their development and growth in the course of becoming full, participating, adult members of society. *See Matheson, supra*, 450 U.S. at 413; *id.* at 422-23 (Stevens, J., concurring in the judgment); *Bellotti II, supra*, 443 U.S. at 635 & n.13; *Ginsburg v. New York, supra*, 390 U.S. at 640-41; *Prince v. Commonwealth of Massachusetts, supra*, 321 U.S. at 165.

The role of parents in this process is, of course, paramount. *Matheson, supra*, 450 U.S. at 410; *Bellotti v. Baird, supra*, 443 U.S. at 637-38; *Prince v. Massachusetts, supra*, 321 U.S. at 166. "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v.*

[20] A pregnant minor may herself consent to medical treatment or surgery, Ill. Rev. Stat. ch. 111, ¶ 4501 (1985). This provision, however, does not undermine the State's interest in establishing an avenue for parental involvement in a minor's abortion decision. "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." *Matheson, supra*, 450 U.S. at 412; *see also Zbaraz v. Hartigan*, 763 F.2d at 1556 (J.S. App. 44-45).

Society of Sisters, 268 U.S. 510, 535 (1925). Thus, parents are obliged to provide for the health, maintenance, and support of their children. *See* Ill. Rev. Stat. ch. 40, ¶ 1101 (1985). They are expected to care for their child's physical, psychological, and emotional needs, and offer affection and sustenance. They are responsible for directing his education and for instilling in him "moral standards, religious beliefs, and elements of good citizenship." *Bellotti II, supra*, 443 U.S. at 683 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972)); *see also Parham v. J.R., supra*, 442 U.S. at 602; *Pierce v. Society of Sisters, supra*, 268 U.S. at 534-35.

In carrying out these constant and weighty obligations, parents enjoy a substantial measure of "authority in their own household to direct the rearing of their children." *Bellotti II, supra*, 443 U.S. at 638 (quoting *Ginsberg v. New York, supra*, 390 U.S. at 639). What is more, they enjoy a corresponding right to guide and participate in important decisions that affect their children's welfare and growth. *Matheson, supra*, 450 U.S. at 410; *Wisconsin v. Yoder, supra*, 406 U.S. at 233; *Pierce v. Society of Sisters, supra*, 268 U.S. 534-35. Indeed, parental rights are so fundamental that they may not be encroached upon without ample justification. *See Wisconsin v. Yoder, supra*, 450 U.S. at 410; *Stanley v. Illinois*, 405 U.S. 645 (1972). The State, however, may nurture them by enacting laws designed to give them effect. *See Bellotti II, supra*, 443 U.S. at 639 (quoting *Ginsberg v. New York, supra*, 390 U.S. at 639).

The decision to terminate a pregnancy or carry it to term is a serious one. The fact that it is undertaken by an unmarried, dependent minor further underscores its complexity and highlights the need for adult guidance and support. *Matheson, supra*, 450 U.S. at 409-410; *Bellotti II, supra*, 443 U.S. at 640-42. That decision presents a host

of factors to consider relevant to a minor's health, her well-being, her values, and her hopes and aspirations. It calls for a measured assessment of the options available to her and the consequences of choosing any one of them. *See Wynn v. Carey*, 582 F.2d 1375, 1376 (7th Cir. 1978); *H.B. v. Wilkenson, supra*, 639 F.Supp. at 954. Whatever her choice, it is an irreversible one and one that may have a significant impact on her future life. *See Danforth, supra*, 428 U.S. at 95; *id.* at 103.

The waiting period is designed to enable parents to participate in analyzing and evaluating these matters. Because they have known their daughter her entire life, they may contribute especially important perspective about the consequences of her decision. They may help her evaluate realistically the effects that her choice will have on her future. They may assist her in understanding alternative courses of action. Her parents can offer advice in the selection of a physician and supply facts about her medical history. In short, their assistance may make her decision a more informed one, an objective that "goes to the heart of the minor's right to decide whether to terminate her pregnancy." *Wynn v. Carey, supra*, 582 F.2d at 1385; *see also Danforth, supra*, 428 U.S. at 94-95 (White, J., dissenting).

Even apart from their contribution to her decision, however, parents have a fundamental right to be apprised of actions that may have profound and long-ranging consequences for their child. *Bellotti II, supra*, 443 U.S. at 637-39; *id.* at 657-58 (White, J., dissenting). As her primary caretakers, parents have an interest in ensuring that she is protected from harm. The abortion procedure, no matter how routinely safe, is a surgical procedure that offers some risk of injury. *See Zbaraz v. Hartigan*, 763 F.2d at 1549 (Coffey, J., dissenting) (citing J. Pritchard & P. McDonald, *Williams Obstetrics* 603 (16th ed. 1980)) (J.S. App. 31). The harmful effects of the abortion, moreover, may not be physical. Indeed, this Court has acknowledged "the potentially grave emotional and psychological consequences of the decision to abort." *Matheson, supra*, 450 U.S. at 412-13; *id.* at 423 (Stevens, J., concurring in the judgment).

For many families, abortion implicates deeply held religious and moral beliefs. The right of parents to instruct their children in this realm goes to the very heart of the liberty and freedom of choice that the Constitution reserves to the family. *See Bellotti II, supra*, 443 U.S. at 638; *Pierce v. Society of Sisters, supra*, 268 U.S. at 534-35. It is also basic to the important role parents play in contributing "to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding". *Bellotti II, supra*, 443 U.S. at 638-39.

The twenty-four hour waiting period promotes and protects these important interests in ways a simple notice requirement does not. Notice alone is not the objective of the Illinois Act. Its aim is, rather, to enable parents to provide their daughter with the advice, support, and guidance that she is unlikely to obtain from other sources. Absent the waiting period, these objectives could be spited by a telephone call to the parents minutes before the minor undergoes the abortion. The State is surely not required to select such a hollow method to carry out these significant objectives.[21] *See Akron Center for Reproduc-*

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[21] Indeed, in *Matheson, supra*, 450 U.S. at 412, one basis for challenging Utah's notice statute was that by failing to provide a waiting period, the statute fell short of achieving its intended objective of parental consultation. This Court rejected that argument, finding it sufficient that the statute was "reasonably calculated to protect minors . . . by enhancing the potential for parental con-

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tive Health, Inc. v. Rosen, supra, 633 F.Supp. at 1139 (notice upheld in *Matheson* would be "empty formalism with no practical effect if the abortion could proceed before parental consultation could take place.").

The decisions of this Court envision a real and substantive opportunity for parental involvement. They presume that consultation will occur and, indeed, that it may even force an immature and dependent minor to forego the abortion unless doing so would be against her best interests. *Ashcroft, supra,* 462 U.S. at 491-92; *Matheson, supra,* 450 U.S. at 411-13; *id.* at 423-24 (Stevens, J., concurring in the judgment); *Bellotti II, supra,* 443 U.S. at 637-39; *id.* at 656-57 (White, J., dissenting). These expectations are perfectly consistent with the general notion that whenever the law requires notice, it aims at meaningful notice that is reasonably calculated to apprise an individual that his rights may be affected and afford him an opportunity to protect them. *See, e.g., Quilloin v. Walcott,* 343 U.S. 246, 253-54 (1978); *Stanley v. Illinois, supra,* 405 U.S. at 650-59; *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950).

In this case, notice should be reasonably calculated to apprise parents of the pendency of their daughter's abortion and afford them an opportunity to consult with her before it is undertaken. The twenty-four hour waiting period merely ensures that that opportunity will have some substance. In light of the importance of the abortion decision and the myriad factors parents and their daughter will be called upon to consider, evaluate, and discuss, a twenty-four hour wait is not an overly burden-

[21] *continued*
sultation." *Id.* That standard necessarily permits Illinois to impose a requirement that is more closely fashioned to vindicate its interests.

some requirement. *See, Zbaraz v. Hartigan,* 763 F.2d at 1552-53 (Coffey, J., dissenting). (J.S. App. 37-38)

C. The Short Waiting Period In The Illinois Act Does Not Impose An Undue Burden Upon An Immature, Dependent Minor In Exercising Her Right To Obtain An Abortion.

In *Ashcroft,* this Court held that a state was free to impose a permanent impediment to a minor's abortion unless she obtained a judicial waiver of that requirement. Without considering the import of that decision to this case, the majority ruled that it was unconstitutional for the State of Illinois to require any delay once notice had been given to a minor's parents. Instead, the majority relied upon its assessment of the burdens imposed by a waiting period to preclude the State from adopting a less onerous method to ensure parental involvement. Its decision is inconsistent with *Ashcroft.*

Restricting a minor's right to an abortion by requiring her to obtain her parents' consent before undergoing that procedure is far more restrictive than the short delay prescribed in the Illinois Act. Obtaining parental consent may result in substantial delays and even preclude the minor from having the abortion altogether. In contrast, the Illinois Act does not impose a parental veto. It merely requires notice and allows a brief time to facilitate consultation between parents and their daughter. After notification occurs and the waiting period ends, the minor is free to proceed with the abortion whether or not her parents consent.

In *Ashcroft,* this Court weighed the burdensomeness of the more restrictive parental consent requirement and found that it was justified by the important, countervailing state and parental interests. If states may constitutionally impose such a stringent impediment to a minor's

abortion, Illinois is surely within constitutional bounds in requiring this brief delay.

One of the primary purposes of the waiting period is to provide some assurance that parents and their daughter will have a reasonable opportunity to discuss and analyze the many factors that will make her decision an informed one. Its aim is, therefore, "to vindicate the very right created in *Roe v. Wade* [ ]—the right of the pregnant woman to decide 'whether or *not* to terminate her pregnancy' ". *Danforth, supra,* 428 U.S. at 94-95 (quoting *Roe v. Wade,* 410 U.S. 113, 153 (1973) (emphasis added)). Because a minor is not presumed capable of discerning and evaluating the many factors that go into that decision, the constitutional analysis applicable to a waiting period affecting only minors cannot be equated with that used to invalidate a similar requirement imposed upon an adult woman.

Yet, the majority indiscriminately applied *Akron* and other decisions which were inapposite to the narrow issue presented in this case. In so doing, it speculated that the factual basis for those decisions applied with equal force here and failed to assess properly the qualitatively different constitutional interests that this case presents.

In *Akron,* the ordinance required an adult woman or one of a minor's parents to wait twenty-four hours between the time the person signed a consent form and the time the abortion was performed. 462 U.S. at 423-24 & n.6. The Court struck down this requirement because *Akron* "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period." *Id.* at 450. No medical justification was offered in support of the requirement and the Court was unconvinced that the delay would contribute to a more informed decision. Moreover, requiring a woman to wait

in all cases curtailed the ability of her physician to exercise his best medical judgment. *Id.*

Unlike the ordinance in *Akron,* the Illinois Act applies only to unemancipated minors who chose to forego the judicial alternative or who do not meet the requirements for exemption. Whereas Akron imposed its waiting period following counseling, Illinois requires a short delay as a means of ensuring that counseling with parents will occur. Even more fundamentally, unlike *Akron,* Illinois is permitted to presume that the class of persons the waiting period affects is not capable of making a decision solely in consultation with her physician. *See Matheson, supra,* 450 U.S. at 420 & n.8 (Powell, J., concurring); *Bellotti II, supra,* 443 U.S. at 641 & n.21. Thus, the Illinois Act has different goals and is designed to protect distinct interests.

Moreover, despite the majority's contrary finding, the burden imposed on an Illinois minor is quite different from that the adult woman endured in *Akron.* There, under the ordinance itself, the woman was required to make two trips to the abortion provider's facilities. She had to be "orally informed by the attending physician" and sign a consent form only to return again for the abortion. *Akron, supra,* 462 U.S. at 422 n.4, 423 n.5. Based on these facts the district court found that the delay might exceed twenty-four hours and thereby increase the risks of the procedure. *Id.* at 450.

The Illinois Act, in contrast, does not *require* two trips to the abortion facility. Indeed, there is no readily apparent reason for a minor ever to have occasion to visit the abortion provider other than on the day the abortion is to be performed. When the minor calls to make her appointment, the provider need only inform her that under Illinois law, he must notify her parents twenty-four hours prior to the performance of an abortion. At that

time, he may also wish to inform her that a judicial waiver may be sought if the minor desires to avoid notice altogether. If the minor agrees, the provider may promptly notify her parents and schedule the abortion for twenty-four hours later. All of this can be done by telephone, without any necessity for a visit to the provider's facilities. Ill. Rev. Stat. ch. 38, ¶ 81-63(c).

On the other hand, if the minor has already notified her parents, the provider can advise her that she may obtain an abortion immediately if her parents accompany her to the abortion or send with her notarized statements. Ill. Rev. Stat. ch. 38, ¶ 81-64. If the minor decides to pursue judicial waiver of notice, she may arrange to have the abortion performed immediately upon securing the waiver. In any case, the minor need not visit the clinic prior to the abortion and two trips are not required by law.

Since two trips are not required, the Act does not impose additional costs on the minor that would restrict her ability to obtain an abortion. The only burden placed upon her is the minimal inconvenience of having to postpone her abortion for one day and then only when she has not arranged for her parents to be present or to bring their statements with her to the abortion. Moreover, if the minor's situation is such that a delay of even one day would so complicate her pregnancy as to require an immediate abortion, the medical emergency exception is available and no wait would be required. Ill. Rev. Stat. ch. 38, ¶ 81-6C.

Most of the other decisions that the majority relied upon, like *Akron*, imposed a waiting period which also applied to adult women.[22] Many of these cases, like *Akron*,

[22] *See American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984), *aff'd*, ____ U.S. ____,

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involved statutes which themselves required the woman to attend counseling or to sign a form and later return for the abortion.[23] Some of these decisions were supported by evidence demonstrating the burdensomeness of the waiting period in the geographic regions in which the requirement applied. For example, in *Margaret S. v. Edwards*, 488 F.Supp. 181, 212 (E.D. La. 1980), the evidence disclosed that all reported abortions in Louisiana occurred in Baton Rouge or New Orleans and that the majority of patients at one of the clinics were from outside the city. A more extreme example was presented in *Leigh v. Olson*, 497 F.Supp. 1340, 1347 (D. N.D. 1980), where there was only one physician in the state who would perform first trimester abortions for reasons unrelated to the life or health of the mother.

In stark contrast, the evidence in this case does not demonstrate how similar burdens will be suffered by Illi-

[22] *continued*
106 S.Ct. 2169 (1986); *Women's Services, P.C. v. Thone*, 690 F.2d 667, 668 (8th Cir. 1982), *vacated sub nom. Kerry v. Women's Services, P.C.*, 462 U.S. 1126 (1983); *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983); *Planned Parenthood League of Mass. v. Bellotti*, 641 F.2d 1006, 1014-16 (1st Cir. 1981); *Charles v. Carey*, 627 F.2d 772, 786 (7th Cir. 1980); *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F. Supp. 1136, 1137 (D. R.I. 1982); *Leigh v. Olson*, 497 F.Supp. 1340, 1348 (D. N.D. 1980); *Margaret S. v. Edwards*, 488 F.Supp. 181, 212 (E.D. La. 1980); *Women's Community Health Center v. Cohen*, 477 F.Supp. 542, 551 (D. Me. 1979).

[23] *See American College of Obstetricians and Gynecologists v. Thornburgh, supra*, 737 F.2d at 293; *Women's Services, P.C. v. Thone, supra*, 690 F.2d at 668, *reaffirming after remand*, 636 F.2d 206, 210 (8th Cir. 1980); *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft, supra*, 655 F.2d at 866; *Planned Parenthood League of Mass. v. Bellotti, supra*, 641 F.2d at 1013; *Charles v. Carey, supra*, 627 F.2d at 786; *Women's Medical Center of Providence, Inc. v. Roberts, supra*, 530 F.Supp. at 1145; *Margaret S. v. Edwards, supra*, 488 F.Supp. at 212.

nois minors by virtue of the Act's requirements. Appellees' affidavits presume that two trips to the abortion provider are necessary. (Affidavits of Charles, ¶ 5; Osgood, ¶ 7, Markoff, ¶ 5; J.A. 7, 10-11, 13). However, they do not explain the basis for that assumption. Their objections to the waiting period do not take into account that many of the problems that they perceive could be overcome by informing the minor of the Act's requirements and her options for avoiding them over the telephone, thus preventing the need for an additional visit to the provider before the date of the abortion. Further, there is no evidence that in Illinois abortions are preformed only in isolated areas requiring minors residing in outlying regions to travel long distances only to find that an additional wait will be necessary.

The majority of the panel also failed to consider that while many of the cases it relied upon *also* involved parental consent or notification requirements, the constitutional determination pertinent to those requirements rested on an entirely different analysis. For the most part those provisions were found to be unenforceable because they did not supply a judicial alternative so that a minor could avoid parental participation or they offered a plainly inadequate one. *American College of Obstetricians and Gynecologists v. Thornburgh, supra,* 737 F.2d at 296-97; *Leigh v. Olson, supra,* 488 F.Supp. at 203-05; *Women's Community Health Center, Inc. v. Cohen, supra,* 477 F.Supp. at 546-48. Of these cases only two, *Wynn v. Carey,* 599 F.2d 193 (7th Cir. 1979) and *Indiana Planned Parenthood Association v. Pearson,* 716 F.2d 1127 (7th Cir. 1983), squarely considered the constitutionality of a waiting period applicable exclusively to minors.

In *Wynn*, the statute allowed the minor to seek judicial consent only after her parents refused to give their approval of the abortion. It further required the minor to wait forty-eight hours even after she had obtained judicial consent. *Wynn v. Carey, supra,* 582 F.2d at 1389 (7th Cir. 1978) (review of preliminary injunction against same statute). Not only did such an extended wait create formidable obstacles to the minor's ability to exercise her right effectively, unlike this Act, it could not be said to serve any legitimate end. The court's approval was given only if it found that "the pregnant minor fully understands the consequences of an abortion to her and her unborn child." *Id.* at 1374 (quoting Ill. Rev. Stat. ch. 38, ¶ 81-54 (1979)). That finding necessarily meant that the minor, like the adult woman in *Akron*, could be presumed to judge for herself the wisdom of her decision. Moreover, the requirement that parents receive notice in all cases was plainly inconsistent with *Bellotti II.*

Pearson, then, is the only case cited which directly addressed the issue presented here.[24] In that case, like this one, the Seventh Circuit incorrectly evaluated the constitutional interests at stake and held the state to a standard that it was not required to meet under this Court's decisions.

The Illinois Act fully comports with those decisions. While it requires parental notice and a short waiting period, it allows a waiver of those requirements if the

[24] The majority did not consider the Sixth Circuit's opinion in *Akron* which upheld a provision containing a waiting period that was challenged by immature, dependent minors. *Akron Center for Reproductive Health, Inc. v. City of Akron,* 651 F.2d 1198, 1205-1206 (6th Cir. 1981), *aff'd in part, rev'd in part on other grounds,* 462 U.S. 416 (1983). That decision was not appealed. *See Akron, supra,* 462 U.S. at 439 n.29. Moreover, it did not consider that the First Circuit permitted Massachusetts to exact parental consent, with its potential for indeterminate delays, where the judicial alternatives were found constitutionally adequate. *Planned Parenthood League of Mass. v. Bellotti,* 641 F.2d at 1009-11.

minor petitions the circuit court and demonstrates that she is mature or that notice would not be in her best interests. If a minor is found to be mature or to be one whose best interests dictate waiver of notification, no waiting period is required prior to the abortion. If a minor chooses not to pursue the judicial alternative or her petition is denied, the waiting period may be by-passed if her parents have been notified and they either accompany her to the place where the abortion is to be performed or they submit notarized statements indicating that they have been notified. Ill. Rev. Stat. ch. 38, ¶ 81-67(a).

The twenty-four hour waiting period need not apply to all minors. Every minor is free to seek judicial waiver and, under the Act, is provided with the assistance of a guardian *ad litem* and court-appointed counsel. Ill. Rev. Stat. ch. 38, ¶¶ 81-64(c), 81-65(a), (b). While the circuit court may deny a minor's petition, it does so only upon a finding that the minor is either not mature enough to make the decision on her own or, if she is immature, that parental notification will not disserve her best interests. Those minors who fall within the first category will not be unduly encumbered by the short waiting period. If they have not notified their parents in advance, the waiting period will provide, as it was designed to do, an opportunity for meaningful consultation. If they have, and they wish to avoid the twenty-four hour delay, they may arrange for their parents to accompany them or bring their statements to the place where the abortion is to be performed. Ill. Rev. Stat. ch. 38, ¶ 81-67(a).

Those minors who fall within the second category are *a fortiori* a class most in need of parental consultation. An independent, adult assessment has been made that they are not mature enough to evaluate, without parental guidance, the numerous factors that go into the abortion decision or that their best interests would not be

served by allowing them to make such a serious decision on their own. Since they are in special need of assistance, a short waiting period, designed to ensure that they in fact obtain it, is closely correlated with the State's asserted interest. Ill. Rev. Stat. ch. 38, ¶ 81-65.

The waiting period, like a parental consent or notice requirement, attempts to ensure that an immature, dependent minor will "seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Danforth, supra*, 428 U.S. at 91 (Stewart, J., concurring). In so doing, it aims at ensuring that the decision is well-informed with an appreciation of its consequences. It is further designed to preserve for parents an opportunity to participate in decisions that may profoundly affect their daughters' lives. Unlike a consent statute, the Illinois Act employees a gentler means to reach these objectives. Unlike a notice provision, it offers some reasonable assurance that they will be met. In light of the need to arrange time for discussion, the importance of the decision, and the many factors to be evaluated and considered, a twenty-four hour wait is hardly an unreasonable restriction.

CONCLUSION

For all of the foregoing reasons, appellant NEIL F. HARTIGAN, Attorney General of the State of Illinois, respectfully requests this Honorable Court to reverse the judgment of the Court of Appeals holding unconstitutional the waiting period in Section 4(a) and Section 7(a) of the Illinois Parental Notice of Abortion Act of 1983 and to

vacate the permanent injunction preventing him from enforcing those provisions.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. CONST. amend. XIV, §1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

ILLINOIS PARENTAL NOTICE OF ABORTION ACT OF 1983

Par.
81-61. Short title.
81-62. Legislative purpose and findings.
81-63. Definitions.
81-64. Notice required.
81-65. Procedure for waiver of notice.
81-66. Medical emergency exception.
81-67. Other exceptions.
81-68. Penalty.
81-68.1. Invalidity—Severability.
81-69. Repealer.
81-70. Effective date.

AN ACT relating to notice of abortions performed on minors and incompetents, and to repeal Section 3.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended. P.A. 83-890, veto overridden Nov. 2, 1983, eff. Jan. 31, 1984.

Ill. Rev. Stat. Ch. 38, ¶ 81-61 (1985)

81-61. Short title

§ 1. Short title. This Act shall be known and may be cited as the Parental Notice of Abortion Act of 1983.

Ill. Rev. Stat. Ch. 38, ¶ 81-62 (1985)

81-62. Legislative purpose and findings

§ 2. Legislative purpose and findings. (a) It is the intent of the legislature in enacting this parental notice provision to further the important and compelling State interests of: 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their household.

(b) The legislature finds as fact that: 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

Ill. Rev. Stat. Ch. 38, ¶ 81-63 (1985)

81-63. Definitions

§ 3. Definitions. For purposes of this Act, the following definitions will apply:

(a) "minor" means any person under the age of 18;

(b) "emancipated minor" means any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents;

(c) "actual notice" means the giving of notice directly, in person or by telephone;

(d) "abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth;

(e) "incompetent" means any person who has been adjudged a disabled person and has had a guardian appointed for her as provided under Section 11a-3(a)(1) or Section 11a-3(3) of the Probate Act of 1975.[1]

[1] Chapter 110½, ¶ 11a-3.

Ill. Rev. Stat. Ch. 38, ¶ 81-64 (1985)

81-64. Notice required

§ 4. Notice required. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician, hereinafter called the "referring physician", certifying that the referring physician or his agent has given such notice.

(b) If the minor's or incompetent's parents are divorced, or one parent is not available to the person performing the abortion or his agent or the referring physician or his agent in a reasonable time or manner, then notice to the parent with custody or to the parent who is available shall be sufficient. If neither parent nor the legal guardian is available to the person performing the abortion or his agent or the referring physician or his agent within a reasonable time or manner, notice to any adult person standing in loco parentis shall be sufficient.

(c) A minor or incompetent who objects to notice being given her parents or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement of this section pursuant to the procedures of Section 5 of this Act.[1]

[1] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-65 (1985)

81-65. Procedure for waiver of notice

§ 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent. These proceedings shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act[1] requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-66 (1985)

81-66. Medical emergency exception

§ 6. Medical emergency exception. The requirements of Section 4 of this Act[1] shall not apply when, in the best medical judgment of a physician based on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis of any medical judgment that warrants failure to give notice pursuant to this Act shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. Dissemination of this report shall comply with the reporting and confidentiality requirements of Section 10 of the Illinois Abortion Law of 1975.[2]

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-30 of this chapter

Ill. Rev. Stat. Ch. 38, ¶ 81-67 (1985)

81-67. Other exceptions

§ 7. Other exceptions. (a) When the parties to whom notice must be given pursuant to Section 4 of this Act[1] have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit signed notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply.

(b) Notwithstanding any other provision of this Act, no notice need be given to any father of any minor requesting an abortion when the minor's mother accompanies her to the abortion and submits a notarized statement that she has been notified and, further, states orally to the physician or his agent that she has a reasonable belief that the fetus to be aborted is the child of the minor's father. Where the mother is deceased or otherwise unavailable, the physician or his agent may rely on a similar statement provided by any other adult relative accompanying the minor. Any physician or his agent relying on such a statement in good faith shall not be civilly or criminally liable under any provision of this Act for failure to give notice. Nothing in subsection (b) shall be construed to limit the alternative and additional right of a minor to seek a waiver of the notice requirement in accordance with Section 5[2] on the grounds that notice would not be in the best interests of the minor because the fetus to be aborted is the child of the minor's father.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-68 (1985)

81-68. Penalty

§ 8. Penalty. Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent, and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor.

Failure to provide persons with information pursuant to the requirements of this Act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

Such prima facie evidence shall not apply to any issue other than failure to inform the parents or guardian and interference with family relations in appropriate civil actions.

Ill. Rev. Stat. Ch. 38, ¶ 81-68.1 (1985)

81-68.1. Invalidity—Severability

§ 8.1. If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.
Added by P.A. 83-1128, § 3, eff. June 30, 1984.

Ill. Rev. Stat. Ch. 38, ¶ 81-69 (1985)

81-69. Repealer

§ 9. Section 3.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended,[1] is repealed.

[1] Paragraph 81-23.3 (repealed) of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-70 (1985)

81-70. Effective date

§ 10. This Act takes effect 90 days after it becomes a law.

APPELLEE'S

BRIEF

No. 86-870

Supreme Court, U.S.
FILED
FEB 12 1987
JOSEPH SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1986

NEIL F. HARTIGAN,

Appellant,

v.

DAVID ZBARAZ, M.D. and
ALLAN G. CHARLES, M.D.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether defendant erroneously sought to invoke this Court's mandatory appeal jurisdiction under 28 U.S.C. § 1254(2) by seeking review of a nonfinal order of the court of appeals, which reversed the district court's decision holding unconstitutional the entire Illinois Parental Notice of Abortion Act and accordingly, remanded the case to the district court for further proceedings contingent upon rulemaking proceedings in the Illinois Supreme Court?

2. Whether § 4(a) of the Illinois Parental Notice of Abortion Act, which imposes a mandatory waiting period after parental notice is given but before an abortion can be performed, is inconsistent with this Court's decision in *City of Akron v. Akron Center for Reproductive Health Inc.*, 462 U.S. 416 (1983)?

PARTIES

The defendants below, Neil F. Hartigan, in his official capacity as Attorney General of the State of Illinois, his agents and successors, and Richard M. Daley, in his official capacity as State's Attorney for Cook County, Illinois, his agents and successors, and as representative of all Illinois State's Attorneys, are appellants herein. The plaintiffs below, David Zbaraz, M.D., and Allan G. Charles, M.D., brought this suit on behalf of a class of physicians similarly situated and on behalf of their minor patients. Plaintiff physicians are appellees herein.

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(See Brief of Defendant)

JURISDICTION

Defendant Hartigan filed his Notice of Appeal of the decision of the United States Court of Appeals for the Seventh Circuit on August 8, 1985. On October 14, 1986, this Court issued an order reserving the question of jurisdiction and directing the parties to brief the first issue presented in defendant's jurisdictional statement. Defendant seeks to invoke this Court's jurisdiction pursuant to Title 28 U.S.C. Section 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. art. III

(See Brief of Defendant for other provisions)

STATEMENT OF THE CASE

A. Under The Illinois Statutory Scheme, Physicians Must Provide Actual Notice To Both Parents Of A Minor Seeking An Abortion And Thereafter Delay The Procedure For At Least 24 Hours Or Face Criminal Prosecution.

In *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), this Court struck down a mandatory 24-hour waiting period that the City of Akron imposed upon all minors and adult women seeking an abortion. Less than three weeks later, the Illinois General Assembly enacted the Parental Notice of Abortion Act of 1983, Ill. Rev. Stat. ch. 38, ¶ 81-61 – 81-70 (1985)("the Act"), imposing the same waiting period upon minors seeking an abortion. Illinois Governor James R. Thompson vetoed the Act, citing its many constitutional deficiencies.[1]

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[1] Governor Thompson identified the lack of any provisions as-

(Footnote continued on the following page)

Nonetheless, on November 2, 1983, the General Assembly

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1 *(Continued)*

suring anonymous and expeditious judicial by-pass proceedings as among the most glaring of the Act's constitutional deficiencies. (Veto Message of James R. Thompson to members of the 83rd General Assembly, dated September 26, 1983, attached hereto as Appendix B.) Since this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), the Illinois General Assembly has enacted a parade of unconstitutional laws restricting abortion.

Starting with the Illinois Abortion Act of 1975, the General Assembly has imposed criminal penalties upon physicians who perform abortions in an attempt to induce compliance with the "long standing policy of [Illinois] to protect the right to life of the unborn child by prohibiting abortion . . . ." Ill. Rev. Stat., ch. 38 ¶ 81-21 (1975). Much of the original Act has been struck down as unconstitutional, as have a series of amendments. *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978)(three judge court) *aff'd Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979)(11 provisions of the Abortion Act declared unconstitutional); *Charles v. Daley*, 579 F. Supp. 379, 579 F. Supp. 464 (N.D. Ill. 1983) (permanently enjoining 25 provisions of the 1979 and 1983 amendments to the Abortion Act); *Charles v. Daley*, 749 F.2d 452 (7th Cir. 1984)(aff'd district court injunction on three provisions of the 1979 revision of Abortion Act, *appeal dism'd for want of juris. sub nom., Diamond v. Charles*, ___ U.S. ___, 106 S. Ct. 1797 (1986); *Keith v. Daley*, No. 84 C 5602 (temporary restraining order, cont'd by agreement, on the 1984 amendments to the Abortion Act); *Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978)(parental consent law, without judicial by-pass, preliminarily enjoined), *aff'd, Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1979)(preliminary injunction); *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979)(permanent injunction).

The State of Illinois also singles out physicians who perform abortions for an additional level of regulation. *See, e.g., Ragsdale v. Turnock*, 625 F. Supp. 1212 (N.D. Ill. 1985)(preliminarily enjoining provisions of the Ambulatory Surgical Treatment Center Act, Ill. Rev. Stat. ch. 111 1/2, ¶ 157-8.1, *et seq.* (1985), the Medical Practice Act, Ill. Rev. Stat. ch. 111 1/2, ¶ 4433 (1985) and the Health Facilities Planning Act, Ill. Rev. Stat. ch. 111 1/2, ¶ 1151 *et seq.* (1985).

overrode the veto, passed the Act, and set it to become effective within 90 days.

The Act creates an interdependent scheme. Under pain of criminal prosecution, no physician may perform an abortion upon an unemancipated pregnant minor, regardless of her age or maturity, without first giving "actual notice" of the intended abortion to both parents of the minor, and then waiting at least 24 hours after notice has been effected before performing the procedure. A young woman who does not wish to have her parents notified can avoid the statutory notice and waiting requirements only by seeking a judicial waiver.

The waiting period does not begin until both parents independently have received notice. Ill. Rev. Stat. ch. 38, ¶ 81-64(a). (§4(a)).[2] A young woman must delay her abortion after parental notice, even if her parents direct the physician to perform the procedure immediately. Notwithstanding the length of the pregnancy, the waiting period can be waived only if both parents accompany the minor to the medical facility where the abortion is to be performed (§7(a)); if both parents submit notarized statements attesting that they have been notified (§7(a)); or if a physician certifies that a medical emergency "so complicates the pregnancy as to require an immediate abortion." (§6.)

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[2] The Act is printed at the back of this brief as Appendix A. References to the Act include only the appropriate section number rather than the full chapter cite from the Illinois Revised Statutes. The opinions of the lower courts, *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984), and 763 F.2d 1532 (7th Cir. 1985), are printed in the appendix to defendant's jurisdictional statement, which is referred to as "App.___." Citations to the joint appendix filed by plaintiffs and defendants are to "J. App.___." Citations to defendant Hartigan's jurisdictional statement appear as "Juris. st.___;" citations to his brief appear as "Def. br.___."

The Act does not provide exceptions to the two-parent notification requirement in situations in which one parent has been notified and objects to notification of the second parent. It also fails to excuse physicians from notifying both parents when the parents are separated but not divorced, when they never married, or when one parent has deserted the family. The only exceptions to the two-parent notification requirement are: (1) if the parents are legally divorced (§4); or, (2) if the mother of the minor submits a notarized statement attesting that she reasonably believes that her daughter is a victim of incest and the pregnancy was caused by the minor's father. (§7(b).)

A young woman seeking judicial waiver of the notice and mandatory waiting requirements must file a petition for relief in the circuit court of the county where she resides or where the abortion is to be performed. (§4(c).) The circuit court can waive notice only if the young woman can establish that she is mature enough to make the abortion decision or that notice to both parents would not be in her best interests. (§5(d).) Section 5 does not contain any provisions guaranteeing confidential appellate proceedings. Nor does §5 establish an expeditious appeal from an adverse circuit court decision. Instead, §5(g) requests that the Illinois Supreme Court promulgate the rules and regulations "necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner." Despite this and a subsequent request, the Illinois Supreme Court has not yet promulgated rules to complete the judicial by-pass procedures contemplated by the Act.

Under §8 of the Act, a physician who either performs an abortion for a minor without notifying both parents, or fails to delay for at least the mandatory period, is subject to criminal prosecution for a Class A misdemeanor. A conviction is punishable by up to one year of imprisonment and a fine of $ 1,000. Ill. Rev. Stat. ch. 38, ¶ 1005-8-3, 1005-9-1 (1985). Failure to provide notice pursuant to the Act also constitutes *prima facie* evidence of "interference

with family relations" and leaves the physician liable for exemplary damages in a civil action. (§8.)

B. Plaintiff Physicians Mounted A Facial Challenge To The Act, Claiming That It Provided Insufficient Protection Of A Pregnant Minor's Fundamental Rights.

David Zbaraz, M.D.,[3] and Allan G. Charles, M.D.,[4] instituted a facial challenge to the Act on behalf of a class of physicians and on behalf of a class of minor patients seeking pregnancy terminations.[5] Named as defendants were the Attorney General of Illinois, Neil Hartigan, and the State's Attorney of Cook County, Richard Daley, who served as the representative of a defendant class of all Illinois State's Attorneys.

In proceedings before the district court, plaintiff physicians established that the mandatory waiting period

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[3] Dr. Zbaraz, a licensed physician since 1965, is a member of the Department of Obstetrics and Gynecology at Northwestern University Memorial Hospital in Chicago. He also is a clinical assistant professor of obstetrics and gynecology at the University of Chicago. He is a Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists. Dr. Zbaraz' practice is almost evenly divided between obstetrical and gynecological procedures. Only a small share of his practice, approximately 3 per cent, is devoted to performing abortions. (J. App. 4.)

[4] Dr. Charles is a member of the Department of Obstetrics and Gynecology at the Michael Reese Hospital and at the Prentice Women's Hospital and Maternity Center [of Northwestern University Memorial Hospital]. Like Dr. Zbaraz, he is a Diplomate of the American Board of Obstetrics and Gynecology and is a Fellow of the American College of Obstetricians and Gynecologists. Approximately 3 per cent of Dr. Charles' practice consists of performing abortions. (J. App. 6-7.)

[5] Plaintiffs challenged the constitutionality of the Act, on its face and as applied. (Complaint, ¶ 11.) Only the facial invalidity of the Act has been litigated, as it has never been enforced.

imposed a heavy burden upon minors. Dr. Zbaraz attested that the statutorily mandated delay "unjustifiably increases the cost of pregnancy termination, causes unnecessary and harmful stress, and is medically unjustifiable and punitive." (J. App. 5.) Dr. Zbaraz further attested that a waiting period "interferes with [his] professional relationship with [his] minor patients and with the exercise of [his] best medical judgment." (J. App. 4-5.) Dr. Charles echoed the concerns expressed by Dr. Zbaraz and stated that traveling arrangements, costs, and scheduling conflicts could extend the delay caused by the mandatory waiting period longer than 24 hours. (J. App. 7.) Defendants introduced no evidence to rebut the statements of Dr. Zbaraz or Dr. Charles; nor did they seek to depose or cross examine these physicians. Plaintiffs also established that the judicial by-pass procedures of the Act would confuse minors, cause postponement of the abortion procedure, increase the stress of the situation and cause many minors to "end up having unwanted children or seeking an illegal, dangerous abortion procedure." (J. App. 10-11, 13.) Defendants did not introduce any contrary evidence.

The district court entered a temporary restraining order on January 26, 1984, less than a week before the Act was to become effective. The parties stipulated that the restraining order continue until the merits could be adjudicated. Cross motions for summary judgment were filed. On May 4, 1984, the district court issued a decision declaring the Act unconstitutional and permanently enjoining its enforcement. (App. 54-80.)

Relying upon this Court's decision in *Akron*, the district court found that the waiting period in §4(a) imposed an unconstitutional burden on a young woman because it increased the cost of the medical procedure and resulted in a medically inappropriate and potentially hazardous delay. (App. 62.) The district court also ruled that the judicial by-pass procedures contained in §5 were defective because they neither assured that proceedings would be

completed in a timely enough manner to allow a young woman to have a safe abortion, nor protected the minor's privacy and anonymity. (App. 65-67.) Although the district court upheld certain provisions, it enjoined the entire Act, finding that the Act would have little operative significance without the waiting period and without a functioning judicial by-pass system. (App. 72-73.)

On appeal, the United States Court of Appeals for the Seventh Circuit found that the inevitable delay caused by the waiting period imposed a constitutionally impermissible burden on a minor's right to terminate a pregnancy. (App. 4-8, *citing Akron*, 462 U.S. 416 (1983).) Moreover, the statutory exceptions to the waiting period increased rather than alleviated its burden. (App. 8-10.)

Applying *Akron*, and *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), the Seventh Circuit found that the legal standards governing the adequacy of judicial alternatives to parental notice were not in dispute. At a minimum, the judicial alternative " 'must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be performed.' " (App. 11, *quoting Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (*Bellotti II*).) The Act, which contemplates rule-making by the Illinois Supreme Court, was incomplete on its face. (App. 14-20.) It did not contain any provisions assuring the constitutional requisites of an anonymous and expedited appeal.

The Seventh Circuit thus concluded that it was premature to decide the constitutionality of the judicial alternative provided for under §5 until the Illinois Supreme Court had promulgated the necessary rules governing appeals. Accordingly, the Seventh Circuit vacated the district court's holding that the entire Act was unconstitutional; it then remanded the matter to the district court for further proceedings consistent with its opinion. To protect

the constitutional rights of minors, however, the court of appeals directed that the injunction against enforcement of the statute continue:

> until the Illinois Supreme Court enacts rules assuring the expeditious and confidential disposition of the judicial hearings which allow a mature minor or an immature minor whose best interests require an abortion to forego the state's notice requirement.

(App. 23.)

Defendant filed a notice of appeal on August 8, 1985, seeking to invoke this Court's jurisdiction under 28 U.S.C. §1254(2).[6] He sought review of two questions: (1) whether Illinois constitutionally may impose a mandatory waiting period, after parental notification, if "it also provides a judicial alternative to notification"; and, (2) whether the Act's by-pass procedures, which contain no appellate safeguards, provide a constitutionally adequate judicial alternative to parental notice. (Juris. st. at i.)

In response to defendant's request for review, this Court issued the following order on October 14, 1986:

> The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits which is limited to Question 1 presented by the jurisdictional statement.

SUMMARY OF THE ARGUMENT

1. This Court lacks jurisdiction to review the case either under the mandatory appellate review provisions contained in 28 U.S.C. §1254(2) or under the discretionary review provisions for certiorari contained in 28 U.S.C.

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[6] Although defendant Daley filed a notice of appeal on August 19, 1985, he has submitted no jurisdictional statement or brief in this Court.

§1254(1). The absence of jurisdiction necessitates the dismissal of defendant's appeal.

Section 1254(2) obligates this Court to review only final decisions of the courts of appeals which strike down a state statute as repugnant to the Constitution. *Thornburgh v. American College of Obstetricians & Gynecologists*, ___ U.S. ___, 106 S. Ct. 2169, 2175-76 (1986). The prerequisites for §1254(2) jurisdiction are not present in this case.

First, the Seventh Circuit did not issue an order striking down the Act as repugnant to the federal constitution. *Public Service Comm'n of Indiana v. Batesville Telephone Co.*, 284 U.S. 6, 7 (1931). That court explicitly declined to determine the constitutionality of either §5 or of the entire Act until the by-pass provisions have been made complete. Second, the court of appeals did not enter a final judgment because it remanded a significant part of the case for further district court proceedings when the Illinois Supreme Court promulgates the necessary rules.

The close relationship between the waiting period and the issues remaining to be litigated on remand necessarily bars defendant's attempt to take an interlocutory appeal from the Seventh Circuit's decision concerning the waiting period. Because the waiting period in §4 cannot go into effect until a by-pass procedure is fully operative, any decision by this Court on the validity of §4 would be premature and have no impact. The unfinished status of the Act creates the need for further proceedings which also may necessitate a second appeal to this Court. Given these circumstances, the Seventh Circuit was precluded from entering a final judgment that can be reviewed by this Court. *See Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62 (1948). Neither criterion of §1254(2) is satisfied; accordingly, defendant's appeal must be dismissed.

Review by writ of certiorari under 28 U.S.C. §1254(1) is no more appropriate and presents its own jurisdictional

problems that are constitutional in scope. This case is not ripe for review because of the need for further proceedings in the lower federal courts and rule-making by the Illinois Supreme Court. *See Rescue Army v. Municipal Court*, 331 U.S. 549 (1947). If this Court rules on the waiting period before these additional proceedings occur, such a decision will be tantamount to an advisory opinion. *Muskrat v. United States*, 219 U.S. 346, 362 (1911).

2. Should this Court nevertheless reach the merits of this appeal, the decisions of the Seventh Circuit and of the district court striking down the mandatory waiting period should be affirmed. The unrebutted record evidence demonstrates that in this case, as in *Akron*, there is no medical reason to delay the abortion once the patient and her physician have decided to terminate the pregnancy. The medical community is unanimous in its opinion that, once the decision has been made, delaying an abortion increases the risk of the procedure without any corresponding benefits. Minors often are late in recognizing the pregnancy and in reaching a decision about handling the pregnancy. The medical risks inherent in any mandatory delay are thus exacerbated for minors. Moreover, a mandatory waiting period almost certainly results in at least two trips to the physician's office or clinic where the abortion is to be performed. This consequence of the mandatory waiting period will cause additional delays and will increase the costs of the procedure, a critical and often decisive burden for many minors. The state's interest in assuring that the best interests of minors and parents be protected can be satisfied in ways that do not impermissibly intrude upon the exercise of a fundamental right.

3. The constitutionality of the mandatory waiting period is not properly before this Court; nor is the constitutionality of the by-pass provision, which awaits final adjudication below. Thus, plaintiffs renew their motion that this Court dismiss the appeal for want of jurisdiction.

ARGUMENT

I. WITHOUT FULL RESOLUTION OF ALL FEDERAL ISSUES BY THE LOWER COURTS, THIS COURT LACKS JURISDICTION TO HEAR THIS CASE.

A. This Court Does Not Have Jurisdiction Under 28 U.S.C. §1254(2) To Review A Portion Of An Interlocutory Order Of The Court Of Appeals.

Finality as a condition precedent to review is an historic characteristic of this Court's appellate jurisdiction. The object of this requirement has been to have the whole case and every matter in controversy decided in a single appeal. *McLish v. Roff*, 141 U.S. 661, 665 (1891). By enforcing the finality requirement, this Court is saved the needless expense, delays and labors of several successive appeals in the same case. *Id.* at 667. *See also Richardson-Merrell, Inc. v. Koller*, ___ U.S. ___, 105 S. Ct. 2757, 2761 (1985). Strict compliance with this rule also avoids premature and inappropriate adjudications of constitutional issues. Thus, the party seeking review of the lower court's judgment "has the burden of affirmatively establishing this Court's jurisdiction," *Republic Natural Gas*, 334 U.S. at 70-71, with any doubts resolved against its exercise. *Id.*

In *Thornburgh v. American College of Obstetricians & Gynecologists*, ___ U.S. ___, 106 S. Ct. 2169 (1986), this Court rejected an attempt to abrogate the finality requirement and held that jurisdiction under 28 U.S.C. §1254(2) exists only when a party seeks review of a final decision of the court of appeals striking down a state statute as repugnant to the Constitution. The State of Pennsylvania had sought Supreme Court review of an interlocutory order of the Third Circuit. In dismissing the State's appeal, this Court noted:

> It seems clear . . . that the judgment of the Court of Appeals was not a final judgment in the ordi-

> nary meaning of that term. The court did not hold the entire Act unconstitutional, but ruled, instead, that some provisions were invalid under *Akron*, *Ashcroft*, and *Simopolous*, and that the validity of other provisions might depend on evidence adduced at trial, . . . *or on procedural rules to be promulgated by the Supreme Court of Pennsylvania*, . . . [The Third Circuit] remanded these features to the District Court.

Thornburgh, 106 S. Ct. at 2176 (emphasis added). Without a final judgment below, this Court concluded that it had "no appellate jurisdiction under §1254(2)." *Id.* [7]

Notwithstanding *Thornburgh*, defendant here argues that §1254(2) compels this Court to review an interlocutory order of the United States Court of Appeals for the Seventh Circuit.[8] Accepting defendant's argument would eviscerate both the long-standing policy of limiting this Court's mandatory docket, *see, e.g., Gonzales v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974), and the jurisdictional restrictions Congress placed in §1254(2).

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[7] Although this Court treated the State of Pennsylvania's jurisdictional statement as a petition for certiorari and granted review under 28 U.S.C. §1254(1), a similar review of this case by a writ of certiorari risks contravening article III of the Constitution. See pages 26-29, *infra*.

[8] Defendant argues that the remand in this case will involve only issues of law and thereby tries to distinguish *Thornburgh* on the ground that "the Third Circuit contemplated further factual development when it returned *Thornburgh* to the District Court." (Def. br. 33.) This argument is unpersuasive. As defendant himself recognizes, the remand in *Thornburgh* involved both issues of law and issues of fact. (Def. br. 33.) *Compare* 106 S.Ct. at 2175. Moreover, further factual development may be needed here to determine the constitutionality of the by-pass procedures, as applied. Regardless of whether issues of fact or issues of law will be adjudicated on remand, the risk of several piecemeal appeals remains.

1. The court of appeals could not enter a final order because the Illinois Act itself is incomplete.

It is well established that any judicial alternative to parental involvement in a minor's abortion decision must assure a confidential and expeditious proceeding, both in the trial court and in any appeal that may follow. *Akron*, 462 U.S. at 427-28 n. 10; *Bellotti II*, 443 U.S. at 644. *See also Ashcroft*, 462 U.S. at 491 n.16 (opinion of Powell, J. announcing decision of the Court, joined as to this part by Burger, C.J.). On its face, however, the Illinois Act does not assure anonymous and expeditious appellate proceedings because the General Assembly is prohibited from promulgating procedural rules for Illinois appellate courts by article VI, §16 of the Illinois Constitution. (App. 12-13.)

In accordance with this state constitutional dictate, the General Assembly "respectfully requested" that the Illinois Supreme Court promulgate the necessary appellate rules.[9] (App. 84.) At the time the Seventh Circuit reviewed this case, no rules had yet been promulgated.[10] The Seventh Circuit therefore found that the statutory scheme was "incomplete" by its own terms. (App. 14.)

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[9] Section 5(f) of the Act provides:

> An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver.

Section 5(g) of the Act provides:

> The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

[10] The Illinois Supreme Court still has not promulgated rules, despite a subsequent request. See 1986 Resolution of General Assembly, attached hereto as Appendix C.

Illinois law, coupled with the comity concerns, *see Ashcroft*, 462 U.S. at 493, dictated that "the constitutionality of the judicial alternative provided for in Section 5 should not be determined until the Illinois Supreme Court has had an opportunity to promulgate rules governing appeals." (App. 14.) The Seventh Circuit was required to defer a final decision on whether §5 and the entire Act was "repugnant to the Constitution." The Seventh Circuit accordingly vacated the district court's judgment, which had adjudicated the constitutionality of the entire Act, and remanded the case for further proceedings when the Illinois Supreme Court enacts the necessary rules. (App. 23.) Under *Akron*, the court of appeals had no choice but to continue the injunction so as to "prevent the statute's application to minors before adequate appellate recourse is available." (App. 14.)

The statutory incompleteness which necessitated the Seventh Circuit's deference to the state constitutional allocation of power leaves this Court without §1254(2) jurisdiction to review the constitutionality of the judicial bypass provision. *See, e.g., Batesville*, 284 U.S. at 7 (no appeal jurisdiction because court of appeals concluded that the challenged action violated state law, and therefore did not decide whether action was repugnant to federal law).[11]

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[11] Defendant contends that by continuing the injunction the Court of Appeals necessarily [and finally] rejected defendant's argument that the Act could go into effect without state Supreme Court rules. (Def. br. 31.) He cannot, with such an assertion, bootstrap the decision below into a final judgment. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984) (court of appeals' decision that federal law preempted state punitive damage award was not a finding that state damage statute was "repugnant" to the Constitution; although award was reversed, "statute authorizing such award was left untouched.")

By making this argument defendant ignores the very terms of the statute he purports to defend. The General Assembly clearly intended that appellate rules be promulgated. Indeed, in his memorandum asking the district court to enter sum-

(Footnote continued on the following page)

Furthermore, in light of the interdependent statutory scheme, this lack of jurisdiction necessarily denies the Court §1254(2) jurisdiction to determine whether the waiting period would be constitutional if there were a complete, constitutionally sufficient by-pass.[12]

The unitary nature of the Act must preclude defendant's attempt here to take a section-by-section piecemeal appeal. The waiting period cannot go into effect without an operative notice provision.[13] The notice provision, however, cannot go into effect unless and until §5 of the Act has been supplemented with Illinois Supreme Court rules that assure a confidential and expeditious judicial alternative. *See Akron*, 462 U.S. at 439-40.

The facial incompleteness of the Act obligated the Seventh Circuit to enter an interlocutory rather than a final judgment. Any decision rendered by this Court before

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[11] *(Continued)*

mary judgment on his behalf, defendant argued that very point, stating that "sections 5(g) and 5(f) plainly contemplate the issuance of new rules by the Illinois Supreme Court to assure expeditious and confidential proceedings and appeals." ("Defendant Hartigan's Motion For Summary Judgment and Memorandum In Support Thereof" at 10.) Rather than strike down the statute, the Seventh Circuit acceded to its precise terms and to the intent of the General Assembly. As the Seventh Circuit noted, this Court has indicated a willingness "to allow a state supreme court the opportunity to enact constitutional rules governing appeals before it will strike down the statute for failing to provide a judicial alternative to parental notification." (763 F.2d at 1540, citing *Ashcroft*.) *See also American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 297 (3d Cir. 1984), ___ *aff'd*, ___ U.S. ___, 106 S. Ct. 2175 (1986).

[12] In the order issued October 14, 1986, this Court announced that, contingent upon defendant establishing jurisdiction, it would consider reviewing the first issue defendant raised.

[13] A waiting period alone is meaningless; it has significance only insofar as it is applied to delay an abortion after parental notice under §4(a) has been given.

the Act becomes complete and ripe for review inevitably will be advisory in nature. (See pp. 26-29, *infra*.) Under *Thornburgh*, this Court has no appellate jurisdiction and this § 1254(2) appeal must be dismissed. 106 S. Ct. at 2176. *See also Slaker v. O'Connor*, 278 U.S. 188, 189-91 (1929).

2. The narrow exceptions to the finality doctrine cannot encompass the interlocutory order of the Seventh Circuit.

This Court's demand in *Thornburgh* for a final judgment comports with the stringent finality requirement infused through the various statutes delineating the scope of federal appellate jurisdiction. No single formula, however, can fully explain the finality doctrine. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). A final judgment usually is defined to mean "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Accordingly, appellate decisions which anticipate further lower court proceedings are not considered final for purposes of this Court's jurisdiction, *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981), but for a " 'very few' " cases in which the further proceedings involve only state law issues completely dissociated from the federal issue that has been adjudicated, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975)(*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)), and a "small class" of decisions excluded under the collateral order exception, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Defendant cites *Cox*, *Cohen* and numerous other cases in an attempt to convert the Seventh Circuit's decision into a "final" judgment for this Court's review under § 1254(2). (Def. br. 20-32.) Defendant fails in this attempt.[14]

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[14] Defendant does not and cannot articulate an analytical framework within which to present the plethora of cases cited to

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a.) The *Cox* exception does not govern situations in which further proceedings on federal issues are anticipated.

The narrow exception to finality allowed by *Cox* is premised upon finding that the further proceedings would not present even the potential for raising any federal issues. *See San Diego Gas & Electric Co.*, 450 U.S. at 635-36 (Rehnquist, J., concurring). *See also Republic Natural Gas*, 334 U.S. at 71-72. The case at bar does not fall within the *Cox* doctrine. This litigation will not be concluded without substantial further proceedings, which inevitably will involve the decision of additional federal questions. *Compare Thornburgh*, 106 S. Ct. at 2175, *with Zbaraz*, 763 F.2d at 154. Absent in this case is the key factor under the

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14 *(Continued)*

support his plea for the exercise of appellate jurisdiction. By the choice of cases cited, defendant makes an apparent attempt to fit the instant case into an exception to the finality requirement. (*See* Def. br. 22-29.) These cases, however, outline general principles of finality jurisprudence, without application to the facts of this case.

For example, defendant cites *Department of Banking v. Pink*, 317 U.S. 264, 267 (1942), a case in which "nothing remained to be done by the lower court except the ministerial act of entering the judgment," to support his suggestion "that the posture of the case at the time review is sought" makes the Seventh Circuit's judgment final. (Def. br. 31.) The contrast between *Pink* and this case is stark.

Most pertinently, the Seventh Circuit here did not remand for the "ministerial act" of entering judgment. Instead, it remanded the case for further litigation. Whatever rules the Illinois Supreme Court ultimately might promulgate, those rules will have to be tested against not only the constitutional guidelines laid down in *Akron* and *Ashcroft*, but also against the actual impact such rules will have as applied to minors undergoing the by-pass procedure. *See, e.g., Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *petition for cert. filed*, 55 U.S.L.W. 3426 (U.S. Nov. 28, 1986)(evaluating constitutionality of by-pass as implemented and applied to minors).

Cox exception: an assurance that the additional lower court proceedings will not involve "the decision of other federal questions that might also require review by the [United States Supreme] Court at a later date . . .." *Cox*, 420 U.S. at 477.[15]

Defendant's reliance, then, on *Cox* and its related cases is misplaced. In *Cox*, the state court held that the Georgia law authorizing damage actions against the press for publishing the name of a rape victim did not violate the First Amendment. After this decision, the only issue left for further proceedings involved the simple state-law question of whether the defendant Cox Broadcasting's conduct violated the statute. No further federal issues would be tried. *Cox*, 420 U.S. at 485-86.[16]

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[15] Unlike *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), upon which defendant relies, the case at bar does not involve an absolute division between the federal and state issues. In *Dukes*, only one federal issue was posed – whether the "grandfather clause" of the New Orleans ordinance regulating street vendors contravened the Fourteenth Amendment. *Id.* at 298. The only question left on remand was whether, as a matter of state law, the grandfather clause could be severed from the remainder of the statute. *Id.* at 301-02. Because these further proceedings posed "no federal, much less constitutional, question" there was no risk of a second review in this Court. *Id.* at 302. Thus, in *Dukes*, §1254(2) jurisdiction existed.

[16] Similarly, the other cases cited by defendant present situations in which the state court's early resolution of the federal issues left only state law issues to be decided, issues over which this Court has no appellate jurisdiction. For example, the situation presented in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), was almost identical to that posed in *Cox*: In *Austin*, the state court's decision that restraining the distribution of leaflets did not violate the First Amendment was preclusive of the remainder of the litigation, for defendants had no defense but the First Amendment. *See id.* Thus, the further state court proceedings, which would be "little more than a formality," did not involve

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The need for further federal proceedings prevents defendant from squeezing this case into the narrow exception allowed by *Cox*. Thus, the first exception upon which defendant seeks to rely provides no relief from the finality requirement that is a prerequisite for the exercise of this Court's jurisdiction under 28 U.S.C. §1254(2).

b.) This appeal does not fit within the restrictive "collateral order" exception to the finality requirement.

Defendant can find no more solace in the collateral order exception to the finality doctrine than he did in *Cox*. Finality is not established merely because a major issue in the case has been decided. *See Republic Natural Gas*, 334 U.S. at 68.[17] To justify an immediate appeal during

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16 *(Continued)*

any more federal issues. *Id.* at 418 & n.1.

In *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542 (1963), the Georgia court resolved all the federal issues by ruling that the National Labor Relations Act neither deprived it of the jurisdiction to hear the request for an injunction against a labor picket nor precluded the entry of such an injunction. This decision effectively disposed of the Union's rights and thus the litigation, because the Union's reliance on the preemptive effect of the NLRA was its only defense in the state court proceedings. 371 U.S. at 550-5.

Likewise, in *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), the state court quickly rejected petitioner's federal claim that the FCC Act prohibited state court suits. Thereafter, the sole remaining issue – an accounting of the money owed to respondent by petitioner – involved only state law matters. Moreover, in *Radio Station WOW*, the state court had ordered an immediate transfer of property, thus creating the prospect of irreparable injury had this Court not granted immediate review. 326 U.S. at 126.

[17] Defendant's citation of *INS v. Chadha*, 462 U.S. 919 (1983), and related cases simply does not establish the proposition for which he cites them: namely, that invalidation of even

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ongoing litigation by resort to the collateral order exception, a litigant must satisfy three separate criteria. The order from which appeal is sought must: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and, (3) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)(construing *Cohen*). Defendant cannot establish even one of these criteria, let alone all three.

First, the court of appeals' decision did not conclusively determine the disputed issue – the constitutionality of the Act. This is the real disputed issue, not the validity of the waiting period as defendant argues, because a waiting period has no legal significance without an operative by-pass provision. And, as set forth above, the court of appeals specifically declined to adjudicate the constitutionality of this provision. *Compare Parr v. United States*, 351 U.S. 513, 519 (1956)(collateral order exception does not apply when contested order decides only one part of case and thus is but a " ' step toward final disposition of the merits of the case ' " which will " 'be merged into a final judgment[,] ' " *quoting Cohen*, 371 U.S. 541).

Second, the relationship between the contested waiting period and the by-pass alternative is critical. These two sections are entwined because further proceedings to estab-

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17 *(Continued)*

one section of a statutory scheme necessarily is a final judgment of unconstitutionality from which an appeal to this Court may be taken. (Def. br. at 19, 23-24.) In *Chadha*, for example, plaintiffs challenged the constitutionality *only* of § 244(c)(2) of the multi-section Immigration and Nationality Act. Once a decision was rendered on § 244(c)(2), nothing remained to be litigated and thus the judgment was final for purposes of appeal. *See* 462 U.S. at 928-29. The holding in *Chadha* therefore has no precedential value to the situation here, in which appellees challenged the entire statutory scheme, and the validity of § 5 remains to be litigated.

lish a constitutional by-pass *must* occur before the notice provisions, with or without the waiting period, can ever go into effect. *Akron*, 462 U.S. at 439-40; *Bellotti II*, 443 U.S. at 651. Given this interdependence, defendant cannot seriously argue that the decision on the waiting period is "completely separate" from the merits of the remaining part of the statute. *Compare Richardson-Merrell*, 105 S. Ct. at 2761 (collateral order exception does not allow interlocutory appeal of order disqualifying counsel because disqualification "entwined with merits of litigation").[18]

Finally, the constitutionality of the mandatory waiting period will be reviewable at the conclusion of this litigation – whatever the ultimate factual and legal findings about the legitimacy of the by-pass system. In *Republic Natural Gas*, 334 U.S. at 72, this Court made clear that when only one segment of a case has been decided, the case is not " 'ripe for review by this Court.' " *Id.* at 72 (*quoting Collins v. Miller*, 252 U.S. 364, 371 (1920)). *Republic Natural Gas* thus reflects this Court's practice, mandated by 28 U.S.C. §§1254(2) and 1257, of reviewing all of the federal issues presented in a case upon conclusion of the entire litigation. *See also Hughes Tool Co. v. Trans World Airlines Inc.*, 409 U.S. 363, 365 n.1 (1973) (prior dismissal of Supreme

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18 Defendant inaccurately characterizes the Act with his claim that the Seventh Circuit's deferral of a constitutional judgment on the by-pass provisions "has no bearing on the judgment declaring the waiting period and Section 7(a) unconstitutional." (Def. br. 22.) The Seventh Circuit's decision that the unconstitutional waiting period "may be severed from the Act, thereby removing the constitutional infirmity of that provision from the statute without affecting the essential purpose of the Act," (App. 23), does not mean that the waiting period is an "issue completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. While it may be possible for the notice provision ultimately to go into effect without the mandatory waiting period, it is impossible to construct a situation in which a waiting period could become operative without some kind of parental notice being given.

Court case did not establish law of the case or res judicata on points raised in first appeal; those issues thus can be raised in second request for Supreme Court review); and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258-59 (1916)(refusal to grant certiorari to review interlocutory order does not, upon conclusion of case and a second petition for certiorari, prevent Supreme Court from reviewing issue presented in first petition).[20]

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[20] Defendant's assertion that "unless this Court reviews the Court of Appeals' judgment at this point, appellant's opportunity to seek review may be forever foreclosed" (Def. br. 24) is not supported by the cases he cites. Many of defendant's cases involve a § 1257 appeal from a state court decision. Had this Court declined to hear those cases, later Supreme Court review potentially was foreclosed because of a *state* procedure forbidding a second appeal. *See, e.g., Florida v. Meyers*, 466 U.S. 380, 381 n* (1984)(Florida state statute prohibited the State from raising the federal issue in a subsequent appeal); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162-63 (1973)(state procedural law does not allow the agency a right to subsequent appeal); *California v. Stewart, decided with Miranda v. Arizona*, 384 U.S. 436, 498 n.71 (1966)(state law precluded prosecutor's appeal). Defendant cannot point to any Illinois law which would deny him the right to seek Supreme Court review at the conclusion of this litigation in the lower federal courts.

Similarly, *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950), and *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), each involved the application of a federal procedural rule (Rule 54, Fed. R. Civ. P. 54, or its predecessor), which foreclosed a later appeal. In these narrow circumstances, this Court held that a party forfeited its right of review when it failed to appeal in a timely fashion from the final order dismissing all of its claims and concluding all proceedings involving that party. Obviously, there has been no such order dismissing defendant here from any part of this litigation.

Equally inapposite are the other cases defendant cites to support his claim that this appeal represents his only opportunity for Supreme Court review. Most pointedly, and in direct conflict with the defendant's construction, is *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 339, 418 (1923), which

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3. The policies of the final judgment rule dictate dismissal of this appeal.

Defendant cannot escape the finality requirement of § 1254(2). For this Court to accept defendant's plea that jurisdiction be asserted here would undermine every policy underlying the finality requirement and would neither advance the progress of this litigation nor the legitimate interests of the parties.

Review at this juncture would achieve nothing but the costs and delays inherent in permitting "separate review of the component elements in a unified cause." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). Given the important federal issues that remain to be litigated – the constitutionality of the by-pass procedure, both on its face and as applied – another appeal is all but inevitable, especially considering the long history of litigation involving Illinois abortion legislation. *See, e.g., Diamond v. Charles*, ___U.S. ___, 106 S. Ct. 1697 (1986); *Williams v. Zbaraz*, 448 U.S. 358 (1979); and cases cited at note 1, *supra*. Adhering to the finality requirement and deferring review until the litigation is concluded below would allow this Court to address the constitutionality of the Act, taken

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20 *(Continued)*

in fact affirms the principle that review of adverse determinations on a federal issue can be had only after final order has issued, concluding the entire case. Toledo Scale filed its first petition for certiorari in 1921, fully 11 years after litigation had begun, and eight years after several issues had been reviewed by the court of appeals. The petition was nonetheless timely, as it was presented upon the conclusion of all issues in the case, although this Court, for other reasons, declined to grant Toledo's petition. Disallowed, however, was Toledo's later attempt to evade these prior judgments by initiating a second law suit. When Toledo sought Supreme Court review of the Seventh Circuit's order enjoining that second suit, this Court barred as untimely Toledo's renewed effort to attack the judgments issued in the first suit. *Id. at* 418.

as a whole, in a single appeal. Indeed, defendant concedes as much when he acknowledges that "there would be no need for this appeal if review were postponed until the conclusion of the entire litigation." (Def. br. 27.)

The most important principles of comity, including a proper respect for the functions of other branches of government further illustrate the impropriety of defendant's attempt to invoke this Court's jurisdiction. By taking an appeal before the Illinois Supreme Court has promulgated the necessary rules, defendant asks this Court to intervene in what appears to be a dispute between separate branches of the government of the State of Illinois. The Act, reflecting a state constitutional separation of powers, clearly anticipated that the Illinois Supreme Court would promulgate rules.[21] Defendant cannot evade the conse-

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[21] By inviting this Court to review the continuation of the injunction, defendant suggests yet another sharp departure from the rules directing this Court's exercise of jurisdiction. To review the propriety of the injunction, this Court necessarily would have to review the Seventh Circuit's construction of Illinois state law: (1) that the Act was not complete; and, (2) that the Illinois Constitution vests rule-making authority only in the Illinois Supreme Court.

Accepting defendant's invitation would contravene this Court's customary deference to the constructions given by courts of appeals to the laws of states within their circuit. *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). This deference is particularly appropriate here. Prior to this appeal, defendant, the chief law enforcement officer of the State of Illinois, readily agreed that the Act "plainly contemplates the issuance of *new* rules" ("Defendant Hartigan's Motion For Summary Judgment and Memorandum In Support Thereof" at 10, emphasis original), and that under the Illinois Constitution, only the Illinois Supreme Court can promulgate those rules. (*Id.* at 12.) Moreover, by continuing the injunction while

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quences of this state constitutional scheme, notwithstanding his impatience with the Illinios Supreme Court.[22]

This Court long has held that "[t]he policy against premature constitutional adjudications demands that any doubts in maintaining this burden [of establishing jurisdiction] be resolved against jurisdiction." *Republic Na-*

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21 *(Continued)*

declining to decide the constitutionality of the incomplete Act, the Seventh Circuit adhered to the principle that a state statute should not be declared unconstitutional if an injunction can issue to protect plaintiff's interests during the ensuing litigation. *See Withrow v. Larkin*, 421 U.S. 35, 43-44 (1975).

[22] Defendant offers several speculative explanations for the lack of action by the state court, including an implication that the Illinois Supreme Court is confused and unable to "ascertain what action is required or even permitted[.]" (Def. br. 29.) This Court has made clear that it believes the state courts are capable of applying the constitutional decisions of this Court. *Ashcroft*, 462 U.S. at 491 n.16.

Moreover, the General Assembly has made absolutely clear what action it desires from the Illinois Supreme Court. In addition to the request for rules contained in § 5 of the Act, the General Assembly reiterated its request in 1986:

> RESOLVED, BY THE SENATE OF THE EIGHTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that we respectfully urge the Supreme Court of Illinois, as soon as may be practicable, to promulgate rules for confidential and speedy appeals from proceedings at which a minor may prove her maturity or that, if she is immature, an abortion is in her best interests, in order for the Illinois Parental Notice of Abortion Act of 1983 to be enforced . . . .

Resolution of Illinois General Assembly, attached hereto as App. C. Moreover, the General Assembly also requested that a copy of this resolution be presented to each Justice of the Supreme Court of Illinois.

tural Gas, 334 U.S. at 71 (referencing the cases in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 248, 341 (1936)). Defendant's failure to meet this burden, coupled with the cost of piecemeal appeals and the risk of rendering an advisory opinion, demand dismissal of this case.

B. Review By Certiorari Would Be Inappropriate Because Any Decision Rendered As To The Constitutionality Of This Statute, Which Is Not Yet Fully Ripe For Review, Is Tantamount To An Advisory Opinion.

The very factor that precludes the invocation of this Court's obligatory jurisdiction under § 1254(2) – the incomplete by-pass provisions – also renders inappropriate the exercise of this Court's jurisdiction pursuant to a writ of certiorari. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 ~~(1967)~~(case not ripe for review by certiorari when issues remain to be litigated). *See American Construction Co. v. Jacksonville, T. & K. W. Ry Co.*, 148 U.S. 372, 384 (1893)(usually inappropriate to review interlocutory order by writ of certiorari).[23]

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[23] *See also* Stern & Gressman, SUPREME COURT PRACTICE 224 (1986)(although the conclusion of all lower court proceedings is not an explicit condition precedent for review under certiorari, *see* 28 U.S.C. § 1254(1), it is a factor deemed important to the decision whether to exercise that jurisdiction).

Furthermore, the traditional factors which motivate this Court's discretionary exercise of its certiorari jurisdiction are not present here. First, the Seventh Circuit's decision is not in conflict with decisions of this Court, which most recently struck down a mandatory waiting period that applied to minors and adults. *See Akron*, 462 U.S. at 449-51. Second, the courts of appeals have not issued conflicting decisions in need of immediate review by this Court. *Compare Indiana Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127 (7th Cir. 1983)(waiting period applied to minors is unconstitutional); *Women's Services, P.C. v. Thone*, 690 F.2d 667 (8th

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It long has been the policy of this Court to avoid "'anticipat[ing] a question of constitutional law in advance of the necessity of deciding it.'" *Ashwander*, 297 U.S. at 346-47 (Brandeis, J., dissenting in part)(citations omitted). This policy, which governs defendants as well as plaintiffs, *see Diamond v. Charles*, 106 S. Ct. at 1703-1707, involves both constitutional and prudential limitations on the exercise of federal court jurisdiction. *Warth v. Seldin*, 422 U.S. 490 (1975). It is founded in concern that this Court has no power to issue advisory opinions. *See Warth*, 422 U.S. at 499-500 & n.10; *Ashwander*, 297 U.S. at 345-46 (Brandeis, J., dissenting in part). Dismissing this appeal only to grant certiorari would create intractable constitutional problems by stretching this Court's jurisdiction beyond the limits allowed by article III. U.S. Const. art. III.

Rescue Army presents a situation so parallel to the instant one as to control its disposition. This Court dismissed as premature Rescue Army's constitutional challenge of the Los Angeles ordinance governing the solicitation of contributions for charity. The Court held that the case was not ripe because further proceedings in the state

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[23] *(Continued)*

Cir. 1982), *vacated and remanded sub nom., Kerry v. Women's Services, P. C.*, 462 U.S. 1126 (1983)(waiting period applied to adults and minors unconstitutional); *Planned Parenthoood Ass'n, Inc. v. Ashcroft*, 655 F.2d 848 (8th Cir. 1981), *aff'd*, 462 U.S. 476 (1983)(same). *But cf. Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198 (6th Cir. 1981)(defined to hold notice applied to minors facially unconstitutional until challenged by a mature or best interests minor) *aff'd in part, rev'd in part*, 462 U.S. 416 (1983).

Finally, the need for additional proceedings below, which will necessitate further factual development, emphasizes the prudential considerations that mitigate against immediate but premature review of this case. *See Thornburgh*, 106 S. Ct. at 2206, 2212 (O'Connor, J., dissenting).

court system could eliminate all or part of the constitutional case. 331 U.S. at 579-84.

Like the Act here, the different sections of the Los Angeles ordinance constituted a "web of intricately dovetailing references and cross references." 331 U.S. at 564. The California Supreme Court decision from which plaintiffs had appealed left unresolved the relationship among the statutory provisions and whether compliance with one provision would be sufficient to prevent the prosecution of plaintiffs for failing to comply with other sections of the statute. *Id.* at 579-81. To do other than dismiss the appeal, ruled this Court, "would be directly contrary to the policy of avoiding constitutional decisions until the issues are presented with clarity, precision and certainty." *Id.* 576. Any other result also risked violating the article III ban against advisory opinions.

Rescue Army controls the disposition of this case given the lack of action by the Illinois Supreme Court and the symbiotic interplay among the Act's provisions. Any decision on the validity of the waiting period risks violating article III because the Act cannot go into effect until there is a functioning by-pass procedure. No matter how this Court rules on the one issue possibly before it – the constitutionality of the waiting period – that decision will be advisory for it would have no immediate impact upon the rights of the parties. Federal courts simply are "without power to decide questions that cannot affect the rights of litigants." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

This is particularly true when the need for constitutional adjudication is contingent upon some future action, the likelihood of which is uncertain. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984)(chemical company's challenge to the constitutionality of the arbitration and compensation scheme contained in federal pesticide law not ripe when company had not yet been subject to arbitration or injured by it). *See also State Farm Mutual Automobile Insurance Co. v. Dole*, 802 F.2d 474, 480-81

(D.C. Cir. 1986)(regulations not ripe for review because it was unlikely that some of the provisions would ever go into effect). *Cf. Thomas v. Union Carbide Agricultural Products Co.* ___ U.S. ___, 105 S. Ct. 3325 (1985)(contention that tribunal lacks jurisdiction ripe if claimant shows he has been or inevitably will be subject to exercise of unconstitutional jurisdiction).

Even if the Illinois Supreme Court promulgates rules during the pendancy of this case, it still would not be ripe for review by writ of certiorari or appeal.[24] The most appropriate forum for review of those rules in the first instance remains in the district court. *Thornburgh*, 106 S. Ct. at 2177 n.9.[25]

Absent explicit rules and a direction as to how they and the remainder of the by-pass alternative will be applied, a decision on the appropriateness of the waiting period would be tantamount to the giving of "opinions in the nature of advice concerning legislative action ...." *Muskrat*, 219 U.S. at 362. Article III forbids federal courts from deciding such "abstract, hypothetical or contingent questions." *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

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[24] If the Illinois Court were to promulgate rules that assured an expeditious and confidential by-pass proceeding, that action obviously could eliminate the need for a federal court to strike down the Act as facially unconstitutional. Defendant recognizes as much, with his concession that "it is not certain that a future appeal ever will materialize." (Def. br. 27, n.15.) Thus, the doctrine of "strict necessity" provides a compelling reason for this court to avoid exercising jurisdiction, should it even be found to exist. *Rescue Army*, 331 U.S. at 568.

[25] This case presents a very different case from the situation presented to the Court in *Thornburgh*. In *Thornburgh*, granting certiorari did not implicate the article III concerns that are lurking here, for each of the Pennsylvania statutory sections at issue, save the parental notice provision, could be enforced independently of the other challenged provisions of the Act before the Court.

II. THE ACT'S WAITING PERIOD UNCONSTITUTIONALLY BURDENS A MINOR WOMAN'S RIGHT TO DECIDE TO TERMINATE A PREGNANCY.

A. The Fundamental Nature Of The Abortion Right Mandates Strict Judicial Scrutiny Of All State Laws Restricting Its Exercise.

In *Thornburgh*, this Court emphatically re-affirmed *Roe v. Wade*, 410 U.S. 113 (1973), warning that "the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." 106 S. Ct. at 2184. This right of individual liberty and privacy protects the right of every woman "to decide whether to terminate her pregnancy," free from unwarranted governmental intrusion. *Akron*, 462 U.S. at 419.

The constitutional limitations upon a state's authority to restrict a woman's right to seek an abortion are well-defined and require strict observance. Only a compelling state interest will justify restrictive state regulation of the abortion process. *Akron*, 462 U.S. at 427. In more than a decade of abortion litigation, this Court has recognized only a limited number of narrowly defined state interests – the health of the woman and the potential life of the fetus – as compelling enough to justify limited regulation of the abortion right. *Id.* at 427-29. If a regulation is shown to impinge upon either the abortion decision or its effectuation, the state must demonstrate that the regulation is narrowly drawn to further only a compelling state interest and that the impact of the regulation is not undue or unreasonable. *See Akron*, 462 U.S. at 427-28.

Minors are protected by the Constitution and possess fundamental rights which "do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976). Even though a State is allowed limited latitude to enact protective legislation affecting a minor's

exercise of a fundamental right, in many areas of constitutional protection, a minor's right "is virtually coextensive with that of an adult." *Bellotti II*, 443 U.S. at 634. This is so particularly when the fundamental right of abortion is involved because "there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." *Id.* at 642.

Judicial scrutiny of legislation restricting a minor's right to choose is indistinguishable from the standard applicable to state regulation of adults. *See Carey v. Population Services International*, 431 U.S. 678, 687-89, and 692-95 (1977)(plurality). Although a state may have an additional significant interest in protecting minors who chose to terminate a pregnancy, *e.g.*, *Akron*, 462 U.S. at 427 n.10, any regulation of a minor's right to choose must be narrowly tailored and necessary to serve this important state interest. *Id.* at 427 n.10, 439-42. *See also H.L. v. Matheson*, 450 U.S. 398, 413 (1981). Indeed, this Court has cautioned state regulators that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act *with particular sensitivity* when it legislates to foster parental involvement." *Bellotti II*, 443 U.S. at 642 (emphasis added).[26]

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[26] Defendant's argument that, when regulating the fundamental right of a minor to seek an abortion, the State's regulatory measures "may reach wider than necessary or fall short of fully protecting its asserted interest" (Def. br. 40) is unsupported. In no case involving the right of reproductive privacy has this Court held that regulation of a minor's right to an abortion would not be subjected to strict judicial scrutiny. To the contrary, in *Akron*, this Court explicitly rejected the argument that abortion statutes be reviewed under the rational basis test, stating that such analysis "is wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*." 462 U.S. at 420-21 n.1. This Court then proceeded to scrutinize strictly each of the challenged provisions, including the parental consent and the waiting period requirements, applied specifically to minors.

This Court's prior decisions delineating the constitutional scope of the right of privacy demand close judicial examination of the challenged waiting period. Plaintiff physicians established that the challenged mandatory waiting period imposed substantial burdens on minors. Defendant has failed to demonstrate that the statute was necessary to achieve a significant state interest and that it is narrowly drawn to achieve only that interest.

B. This Challenged Waiting Period, Like The One in *Akron*, Is Harmful To The Health Of Minors And Increases The Cost Of Obtaining An Abortion.

Four years ago this Court struck down as unconstitutional an Akron city ordinance which, like the Illinois statute at issue here, prohibited a physician from performing an abortion for a woman until after the expiration of a mandatory 24-hour waiting period. *Akron*, 462 U.S. at 449-51. "'[N]o medical basis'" justified this provision, which needlessly delayed the abortion and raised its cost. 462 U.S. at 450, *quoting* 651 F.2d 1198, 1208 (6th Cir. 1981). Finding such heavy burdens on a fundamental right to be impermissible, this Court held that it was beyond the state's power to require a mandatory waiting period after a woman, in consultation with her physician, had determined that an abortion was appropriate. *Id.*

Nothing in this Court's decision suggested that the *Akron* waiting period, which applied to all women, would be permissible if the mandatory delay restricted only minors. Nonetheless, shortly after *Akron* was decided, the Illinois General Assembly enacted the challenged provision as an integral part of the Act. The waiting period here, as in *Akron*, is likely to cause delays far in excess of 24 hours, significantly increasing the medical risk and cost of effecting the constitutionally protected decision to terminate a pregnancy. (App. 62, *see also* App. 5-7.) Thus, *Akron*, with its unequivocal condemnation of an arbitrary and inflexible waiting period, requires that this most recent attempt by

the State of Illinois to restrict the exercise of a minor's fundamental right to determine "whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), be ruled unconstitutional.

1. Minors will suffer long delays and adverse medical consequences as a result of this Act.

This Court long has recognized that "time is likely to be of the essence in an abortion decision." *H.L. v. Matheson*, 450 U.S. at 412 n.21 (rejecting argument that mandatory waiting period was an essential component of a parental notice statute). A pregnant minor "cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Bellotti II*, 443 U.S. at 642. The waiting period at issue here disregards these important concerns.

In the proceedings below, Dr. Charles, a physician with more than 30 years of experience, attested that "[t]raveling arrangements, costs, and scheduling conflicts are all factors which would prolong the interim" between the minor's initial medical appointment and her return appointment subsequent to the waiting period. (J. App. 7.) Alexa Markoff, a medical social worker who counsels pregnant teenagers also attested that the need for minors to rearrange travel and reschedule appointments "will often result in delays exceeding 24 hours." (J. App. 13.) Ruth Osgood, Director of Educational Services at Concord Medical Center in Chicago, confirmed that, as in *Akron*, scheduling conflicts for both the minor and the clinic produce delays in excess of 24 hours. (J. App. 11.)

The consequences of delaying an abortion are well documented and can be quite severe. Dr. Charles stated that "[m]edical risks with abortions increase as a pregnancy progresses; therefore any required delay before an abortion can be performed is contrary to the best medical practices with respect to minors and unnecessarily increases the potential for medical complications." (J. App. 7-

8.) Dr. Zbaraz concurred, attesting that a mandatory delay not only is medically unjustified but also interferes "with the exercise of [his] best medical judgment." (J. App. 5.) This assessment of the medical risks inherent in delaying an abortion went unrebutted in the lower courts.

Academic studies confirm plaintiff physicians' judgment about the increased risk associated with delaying an abortion. Although the overall number of medical complications due to abortion is low, both the morbidity and mortality rates increase as the pregnancy progresses. W. Hern, ABORTION PRACTICE 26 (1984)("Hern"). After seven weeks, the risk of major complications increases about 20% with each week of gestation. Tietze & Henshaw, INDUCED ABORTION: A WORLD VIEW 1986, 103 (6th ed. 1986)("Tietze & Henshaw"). The mortality rate is estimated to increase 20% with each additional week that the abortion is delayed from eight weeks to 15 weeks, and to increase more rapidly between 15 and 20 weeks. *Id.* at 109-110.[27]

In addition to the medical consequences associated with delay, a mandatory waiting period often is accompanied by increased emotional distress and psychological risk. *See, e.g., Leigh v. Olson*, 497 F. Supp. 1340, 1347 (D.N.D. 1980); *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542, 550 (D. Me. 1979). The 24-

[27] Abortion, however, is much safer for a woman than is carrying the pregnancy to term. Hern at 25-26; *see also* Russo, ADOLESCENT THE EPIDEMIOLOGICAL CONTEXT, in *Adolescent Abortion, Psychological and Legal Issues*, in 59 (G. Melton ed. 1986)("Russo")(risk of dying from childbirth much greater than the risk from having an abortion, combining all weeks of gestation). This is particularly true of pregnant teenagers, for whom abortion is at least five times safer than carrying the pregnancy to term. Hern at 26, citing Cates, "*Abortions for Teenagers*," in ABORTION AND STERILIZATION MEDICAL AND SOCIAL ASPECTS (J. Hodgson 1981). *See also* Brief *Amici Curiae* submitted on behalf of American College of Obstetricians and Gynecologists, *et al.*

hour period immediately preceding an abortion is often the period of greatest anxiety. *See* Nadelson, *Abortion Counseling: Focus on Adolescent Pregnancy*, 54 PEDIATRICS 765, 768 (1974). The challenged Act's further delay of the procedure prolongs the period of greatest anxiety and unnecessarily subjects these young women to additional emotional stress. *Leigh*, 497 F. Supp. at 1347 & n.8.

Avoiding unnecessary delay and the resulting complications is particularly important when minors are involved. Dr. Charles noted that, in his experience, minors "often delay making a decision [about abortion] until well into the first trimester of their pregnancy or even later." (J. App. at 7.) This delay may reflect the minor's inexperience in recognizing pregnancy, as well as patterns of menstrual irregularity.[28] Given the steady increase of the rates of mortality and morbidity as the gestational length of the pregnancy progresses, the deleterious medical consequences of a mandatory waiting period are particularly severe for minors, for whom the pregnancy diagnosis and abortion decision already may have been delayed.

National statistics corroborate the unrebutted medical evidence plaintiffs presented. Statistics compiled by the Centers For Disease Control show that younger women obtain abortions later in pregnancy than do older women. Women under the age of 19 account for 29% of abortions but account for more than 40% of abortions obtained at 16 weeks or more of pregnancy. Russo, at 57.[29] Plaintiffs demonstrated that this Act would require them to delay a minor's abortion, often with attendant health conse-

[28] Ms. Osgood, who has counseled pregnant women for more than 12 years, concurred, noting "[m]any pregnant minors have a tendency to 'block' out the troublesome situation they're in. Consequently, they often delay making a decision until well into their pregnancy." (J. App. 10.) *See also* Russo at 57.

[29] Concern about the consequences of delaying an abortion was

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quences. (J. App. 5, 6, 7.) This medically inappropriate, state-imposed delay interferes with both the physician's professional relationship with the patient and the exercise of his best medical discretion. As the Seventh Circuit found, " 'the same objections to the waiting periods for adults listed in City of Akron apply to waiting periods for minors.' " (App. 3, citation omitted.)[30]

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29 *(Continued)*
one of the factors that led the National Research Council, whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine to the following conclusion:

> The panel concludes that there is at present no scientific basis for restricting the availability of abortion to adolescents. *Evidence shows that to require minor teenagers to seek parental consent often causes them to delay abortions, with attendant health risks.* On this basis, the panel concludes that minor adolescents should be encouraged, but not required, to involve their parents and partners in the decision-making process.

National Research Council, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY AND CHILDBEARING 278-79 (National Academy Press 1987)("NAS Report")(emphasis added).

30 The findings of the lower courts that the waiting period often leads to long delays and adverse medical consequences are not only consistent with this Court's opinion in *Akron* and with the uncontradicted evidence presented in this case, they are also in accord with numerous other decisions striking down mandatory waiting periods for minors or adults, or both. *See, e.g., Pearson*, 716 F.2d at 1143; *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1014-16; *Women's Community Health Center*, 477 F. Supp. at 551; *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F. Supp. 1137, 1146-67 (D. R.I. 1982); *Leigh v. Olson*, 497 F. Supp. at 1348; *Margaret S. v. Edwards*, 488 F. Supp. 181, 212 (E.D. La. 1980). Defendant's attempt to distinguish many of these cases on the ground that the challenged statutes "did not supply a judicial alternative . . . or they offered a plainly inadequate one[,]" is unpersuasive given the failure of Illinois to provide an adequate by-pass. In many of the cases,

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2. The additional costs resulting from the waiting period impose an unconstitutional burden on a minor's right to have an abortion.

The burden imposed by this waiting period is not limited to the increased risks to a young woman's health. As a practical matter, under the Act, a minor must make at least two trips to the medical facility before she may receive an abortion. (*See* App. 62.) The unrebutted evidence submitted to the district court demonstrated that many minors arrive at the medical facility "expecting to get an abortion fairly quickly." (J. App. 13.) Under the challenged Act, however, a physician may not perform the abortion but, as Dr. Charles explained, must first notify the young woman's parents and then advise her that he cannot proceed "for at least 24 hours, and that she will have to return." (J. App. 7.) The return trip necessitates rearranged travel plans and schedules.[31]

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30 *(Continued)*
the absence of a constitutional by-pass often was enough to enjoin these statutes, and the need to scrutinize separately the unconstitutional impact of the waiting period was diminished. Defendant's further reliance upon *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), also is misplaced because the statute there, unlike the one at issue here, allowed broad waiver of the waiting period.

31 Throughout the course of this litigation, defendant has failed to offer any evidence countering the need for two trips. Rather, he relied solely on his suggestion that two trips may be avoided by efficient use of the telephone, a suggestion fraught with additional problems. It is almost impossible for a physician to accurately determine the age of the woman over the telephone. More to the point, it is inconsistent with the standards set by the American Academy of Pediatrics for the physician to use the telephone to advise a patient of such serious matters as confirmation of pregnancy *see* American Academy of Pediatrics, Committee on Adolescence, *Pregnancy and Abortion Counseling*,

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Two separate trips to an abortion facility are likely to prove costly to the young woman. (App. 62; *see also* J. App. 7, 10-11, 13, *accord Akron*, 462 U.S. at 450.) Illinois has few abortion facilities, particularly outside of the Chicago metropolitan area.

For example, as the district court found in *Ragsdale v. Turnock*, 625 F. Supp. 1212, 1217 (N.D. Ill. 1985), *appeal pending* No. 85-3242 (7th Cir.), in 1985 there was but one provider of abortion services in a geographic area which extended from Rockford east to Chicago (a distance of 86 miles), west to Iowa (approximately 75 miles), north to Wisconsin (approximately 20 miles), and south to Peoria (129 miles). Defendant now implies that women seeking an abortion in Illinois do not have to travel long distances to find a physician who provides abortion services (Def. br. at 54) a suggestion wholly unsubstantiated either by record evidence or by the facts.[32]

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31 *(Continued)*

63 PEDIATRICS 920 (1979), and of the need to advise her parents. Accordingly, it is of questionable professional ethics for the physician to follow defendant's suggestion of using the telephone to recommend an abortion to the young woman, and then notify her parents of that recommendation, without first examining the patient.

[32] The scarcity of abortion facilities in Illinois is consistent with data collected from national sources. In 1982, 78 of all United States counties had no identified abortion provider; even in urban areas, 57% of metropolitan counties had no provider. Henshaw, *Abortion Services in the United States, 1981 and 1982*, 16 FAM. PLAN. PERSP. 119-27 (1984). The problem of scarcity is exacerbated when the young woman needs a second trimester procedure, as many minors do. Between 70 and 80 per cent of providers indicate that they will not perform abortions after the first trimester of pregnancy. NAS Report at 191. Most hospitals do not perform second trimester abortions. *See Akron*, 462 U.S. at 435 n. 21. The lack of second trimester facilities is a severe problem in Illinois. Prior to the issuance of an injunc-

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Any cost increase necessitated by two trips falls heavily upon a minor. National statistics indicate that nine of every ten teenagers aged 17 or younger who seek abortions do not have the resources to bear the costs themselves and must rely upon others to help defray the cost. Russo at 59. Furthermore, delay imposed by the waiting period may well result in the need for a second trimester procedure, significantly raising the cost. *See, e.g., Akron*, 462 U.S. at 434-35 (noting increased cost of second trimester procedure); NAS Report at 193. These additional costs unnecessarily infringe upon the minor's fundamental right.

C. Illinois Did Not Narrowly Tailor The Waiting Period To Achieve Its Interest In Promoting Parental Consultation.

Plaintiff physicians proved that the inflexible delay and the increased cost resulting from the waiting period will make it more dangerous and more difficult for a young woman to have an abortion. Given these burdens, it was incumbent upon defendant to demonstrate both a constitutionally permissible interest justifiying the mandatory delay, and that Illinois' scheme is drawn so narrowly as to achieve only that legitimate interest without unnecessarily impairing the fundamental right. *H.L. v. Matheson*, 450 U.S. at 413 (Utah statute "narrowly drawn to protect only those [important state] interests"); *accord Danforth*, 428 U.S. at 75 (state must have "sufficient justification" for restricting minor's exercise of the abortion right). Defendant failed to meet this burden.

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32 *(Continued)*

tion in November 1985, state law restricted all second trimester abortions to hospitals. Ill. Rev. Stat. ch. 111 1/2, ¶ 157-8. *et seq.; Ragsdale v. Turnock*, 625 F. Supp. 1212.

1. The mandatory waiting period is not necessary to accomplish parental consultation.

The state's interest in parental notification is to protect the immature minor by promoting family consultation, when appropriate, about the abortion decision. *See Akron*, 462 U.S. at 427 n.10. In *H.L. v. Matheson*, a case involving an immature minor, this Court held that [illegible] tal notification, without more, accomplished the [illegible] terest by "enhancing the potential for pare[illegible] tion." 450 U.S. at 412. Given the importance of a timely procedure, the Court rejected the contention that a mandatory waiting period after notification was necessary to accomplish the state's objective of parental consultation.

In most cases notification alone should lead to parental involvement, without the state's additional help, because minors are particularly susceptible to parental wishes. *Pearson*, 716 F.2d at 1131-32, 1143. The amount of consultation needed will vary, depending upon the circumstances of each family. By arbitrarily designating an inflexible time period for discussion, the State impermissibly attempts to "forc[e] all to live in certain narrowly defined family patterns." *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977)(plurality). This inflexible waiting period is further flawed because it fails to acknowledge the crucial role played by physicians in assessing the needs of patients. In accordance with the ethical standards of the profession, the physician's medical judgment will require "advis[ing] the patient to defer the abortion when he thinks this will be beneficial to her." *Akron*, 462 U.S. at 450.

Defendant introduced no evidence to suggest, much less prove, that this Court erred, either in *H.L. v. Matheson*, which concluded that a waiting period was not necessary to advance parental consultation, or in its later decision in *Akron*, which found that the imposition of a waiting period unconstitutionally burdened the exercise of a fundamental right. Instead, defendant merely reiterated

the unsubstantiated legislative purpose and findings: that the mandatory waiting period promotes and protects the family structure, the rights of parents, and, inferentially, leads to a more informed decision. (Def. br. 43-49.)[33]

Defendant's unsubstantiated assertions do not satisfy the Constitution.[34] When, as here, a state burdens the ex-

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[33] Defendant's argument that the General Assembly properly has concluded that parental consultation, with a waiting period, is necessary to ensure that a minor make an informed decision about health care is undercut by numerous other statutes that Hartigan is obligated to defend. For example, a pregnant minor can submit to any medical or surgical procedure, other than abortion, without having to notify her parents or secure their consent. Ill. Rev. Stat. ch. 111, ¶4501 (1985). *See also* Ill. Rev. Stat. ch. 111 1/2, ¶4651 (minors entitled to receiving birth control services and information); and, Rape Victims Emergency Treatment Act, Ill. Rev. Stat. ch. 111 1/2, § 87-5(b)(1985)(minors do not need parental consent to secure treatment for sexual assault).

Defendant further asserts that the Act must be constitutional because courts have upheld protective state laws forbidding minors to purchase alcohol, cigarettes, and sexually explicit literature. He then suggests that the rationale behind these laws, without more, justifies restrictions on a minor's right to choose an abortion. (Def. br. 43-44.) This Court rejected an almost identical argument when it was raised in *Danforth*, 428 U.S. at 72; defendant's argument also should be rejected.

[34] At most, the General Assembly's "findings" merely echo the common sense conclusion that "parental consultation is usually desireable and in the best interests of the minor." Ill. Rev. Stat. ch. 38, ¶81-62 (1985). The legislative history of this Act, however, reveals no legislative investigations and no consultation of either medical or psychological experts. Indeed, as set forth in the Brief *Amicus Curiae* submitted by the American Psychological Association ("APA" br.), these findings are sweeping conclusions of social and legislative facts that are at direct variance with empirical findings developed over the past decade. (APA br. 5.) Of particularly doubtful validity is the General Assembly's "finding" that "the medical, emotional and

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ercise of a fundamental right, its attempt to justify that burden as necessary to accomplish a significant state interest "requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy." *Carey*, 431 U.S. at 696(striking down New York law restricting distribution of contraceptives to minors).[35] Not only does the mandatory waiting period fail to advance the state's asserted interest in promoting parental consultation, but the broad reach of the statute risks shattering the family structure, thereby defeating any such interest.

2. The challenged provision is so broadly drawn that it hurts minors and their families.

The waiting period would apply indiscriminately to virtually all minors, even those who voluntarily have ad-

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34 *(Continued)*

psychological consequences of abortion are serious ...." Ill. Rev. Stat. ch. 38, § 81-62(b)(2). Much of the anxiety suffered by a pregnant minor is directly attributable to the pregnancy itself, not the abortion. (*See* APA br. at 20-22.) Most studies have found that abortion is not likely to cause severe emotional problems. NAS Report at 195. Moreover, a minor who has had an abortion can resume a normal life at home and school, whereas teenagers who give birth experience substantial economic and social burdens in addition to greater rates of repeat pregnancies. (APA br. at 21-22; Marecek, *Consequences of Adolescent Childbearing and Abortion*, printed in ADOLESCENT ABORTON: LEGAL AND PSYCHOLOGICAL CONSEQUENCES, 96-115 (G. Melton ed. 1986)(hereafter Marecek)). Amicus also demonstrates the questionable validity of the General Assembly's findings that most minors are incapable of moral reasoning (APA br. at 15), or making informed health care decisions. (APA br. at 16-18).

35 *See also Carey*, 431 U.S. at 702 (White, J., concurring in result because "the State has not demonstrated that the prohibition against distribution of contraceptives to minors *measurably contributes* to the deterrent purposes which the State advances as justification for the restriction")(emphasis added).

vised their parents of the pregnancy and of their desire to have an abortion.[36] The unrebutted evidence showed that minors often "are accompanied by one or both parents to the pre-abortion examination or consultation." (J. App. 4.) In many cases, the minor's decision to have an abortion is made after discussion with one or both of her parents. (J. App. 9, 12.)[37]

Notwithstanding prior parental consultation, the challenged provision would bar a physician from performing an abortion upon the minor "unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman ... of his intention to perform the abortion." (§ 4(a)). Thus, no matter how well considered the abortion decision may be, the family could not implement their decision without medically unnecessary and costly delay. Such an inflexible

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36 Defendant's suggestion that this Act is narrowly drawn because it does not apply to mature minors but only to unemancipated minors, (Def. br. 41, 51), is more apparent than real. Although § 3(b) of the Act excuses notice to parents of a minor who has been freed from their care, custody and control "by court order or otherwise," the Act's severe criminal penalties assure that no physician would accept anything other than a court order as evidence of emancipation. Such a court order is difficult to secure. Under Illinois law, a minor seeking emancipation must petition the circuit court and then prove that he or she "is of sound mind and has the capacity and maturity to manage his own affairs ...." Ill. Rev. Stat., ch. 40, ¶¶ 2203-2209 (1985). No order of emancipation may issue if a minor's parents object. Ill. Rev. Stat. ch. 40, ¶ 2209 (1985).

37 In a nationwide survey, the majority of teens reported that their parents knew they were seeking an abortion. NAS Report at 192. Among younger minors, even more parents were aware of the pregnancy; three-fourths of minors age 15 or younger inform their parents before they obtain an abortion. Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning And Abortion Services*, 12 FAM. PLAN. PERSP. 284, 287-90 (1980).

restriction "unjustifiably interferes with parental interests in rearing their children." *Carey*, 431 U.S. at 708 (Powell, J., concurring)(restriction on distribution of contraceptives to minors unconstitutionally interferes with parents who wish to provide their children with contraceptives).[38]

3. The exceptions to the waiting period are themselves burdensome and do not mitigate the unconstititutional burdens of § 4(a).

Contrary to defendant's argument, the limited statutory exceptions contained in § 7 neither alter the obligatory character of the waiting requirement nor ameliorate its unconstitutional burdens. As the Seventh Circuit found, "[s]ection 7 does not provide an exception to the waiting period for a minor whose parents approve of her decision to have an abortion." (App. 9.) Rather, § 7 imposes additional requirements upon a minor who, with her parents, seeks to waive the waiting period. These additional restrictions themselves raise constitutional problems because they impose even greater burdens upon the pregnant young woman. *Id.*

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[38] Defendant cites *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in support of his argument that the parents' right to control their children is so fundamental that it may not be encroached upon without ample justification. (Def. br. 44-45.) The critical thrust of these cases, however, "has been to protect the privacy of individual families from unwarranted *state* intrusion," *H.L. v. Matheson*, 450 U.S. at 448 (Marshall, J., dissenting)(emphasis added). Thus, contrary to defendant's argument, the cases he cites do not remotely suggest that a state can impose its view of the appropriate mode of decision-making upon an unwilling family. Furthermore, this Court previously has rejected the argument made by the State of Missouri in *Danforth*, 428 U.S. at 72-74, that *Pierce* and *Yoder* legitimated state legislation unduly restricting a minor's fundamental right to have an abortion in the name of parental discretion.

For example, § 7(a) allows a minor to obtain an abortion without delaying 24 hours if "the parties to whom notice must be given pursuant to § 4 of this Act . . . submit signed notarized statements indicating that they have already been notified. . . ." As the district court found, that provision requires a minor seeking an abortion to surrender her constitutionally guaranteed right to privacy in order to avoid the mandatory delay. (App. 67.) The submission to a notary of an affidavit stating that a minor is about to have an abortion could, in many small towns, be tantamount to publishing the information in the local newspaper. (App. 67.)

The other exception in § 7(a) – allowing a waiver of the waiting period if the parents both accompany their daughter to the place where the abortion is to be performed – will have a further deleterious impact on minors needing an exemption. As the Seventh Circuit found, "[t]he problems of scheduling, travel, and expense inherent in a waiting period will increase threefold if a minor's parents are required to accompany her to the abortion clinic." (App. 9.) In sum, § 7 does not alleviate the constitutional infirmity of the waiting period. (App. 10.)[39]

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[39] The requirement of notarized affidavits from parents in order to use the so-called exceptions in § 7(a) emphasizes that the principal purpose of the mandatory waiting period is delay. If telephone notice to the parents satisfies the actual notice requirement of the Act, parents should also be allowed to waive the waiting period over the phone if they cannot accompany their daughter to the clinic or the notary. "Exceptions" which maximize the difficulty of securing an abortion or which jeopardize the young woman's privacy are no exceptions at all and certainly do not make § 4(a) constitutional.

4. The inflexibility of the notice requirement imposes unconstitutional burdens.

The unconstitutionally broad sweep of the Act is highlighted by its failure to provide a meaningful exception to either the mandatory waiting period, or the two-parent notification requirement when family circumstances so necessitate. The waiting period does not begin to run until a physician provides actual notice to both parents. Section 4(a) makes no exception to the waiting period for situations in which one parent is temporarily unavailable, as, for example, a minor whose father or mother was absent on a business trip. Unless the minor can convince her physician to risk the Act's criminal penalties, and perform the abortion without notifying the second parent, she could be precluded from obtaining a safe and timely abortion.[40]

In addition, even though the Act allows the physician to notify only the minor's mother when the pregnancy resulted from incest by the minor's father, the unrebutted evidence demonstrated that other compelling reasons jus-

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[40] The Act does not adequately assist physicians in the determination of when notice to the second parent can be foregone, stating only that notice to only one parent will suffice if the second parent is "not available ... in a reasonable time or manner ...." The Act does not define "reasonable" and Illinois case law interprets this term variably, depending upon "the circumstances attending each particular case." *Cohen v. Southern Ry. Co.*, 358 Ill. 532, 537, 193 N.E. 480 (1934); *Saskill v. 4-B Acceptance*, 117 Ill. App. 3d 336, 453 N.E.2d 761 (1983). To ask a physician to make what is essentially a legal judgment about reasonable time and manner depending upon "the circumstances" runs afoul of this Court's decision in *Colautti v. Franklin*, 439 U.S. 379, 394 (1979), holding unconstitutional a restrictive abortion law which "condition[ed] potential criminal liability on confusing and ambiguous criteria." This Court warned that such a law "presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Id.*

tify waiving two-parent notification and the waiting period. The risk of violence – to the minor, her mother, or both, is one such reason. Ms. Osgood attested that she often has counseled mothers and their pregnant daughters who fear that notice to the minor's father will result in family violence. (J. App. 10).

Another consequence of an inflexible two-parent notification requirement is that "minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement" and instead go to court to avoid parental notice altogether. *Hodgson*, 648 F. Supp. 756. Thus, the state's mandated mode of familial interaction may actually reduce parental consultation.

5. The unconstitutional burdens imposed by this Act are not mitigated by the distinction between "consent" and "notice" nor the prospect of a judicial by-pass procedure.

In his final effort to defend the waiting period, defendant tenders two arguments, neither of which is supported by prior decisions of this Court. Defendant contends that parental notice is somehow less restrictive than parental consent and is subject to "an entirely different analysis." (Def. br. 54.) Defendant also asserts that creation of a judicial alternative to notification not only entitles the state to enact a more stringent notice provision, but again subjects the Act to "more lenient scrutiny." (Def. br. 41.)

This Court has recognized that a statute requiring parental notice raises the same constitutional issues as a statute requiring parental consent. *See, e.g., Akron*, 462 U.S. at 427-28 n.10; *H.L. v. Matheson*, 450 U.S. at 420 n.9 (Powell, J., concurring.)[41] *But see H.L. v.*

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[41] *See also Bellotti II*, 443 U.S. at 463 (plurality opinion of four Justices, Powell, J.), and 443 U.S. at 655 (Stevens, J., concurring); *accord, Pearson*, 716 F.2d at 1132 (Seventh Circuit sub-

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Matheson, 450 U.S. at 411. Treating notice and consent requirements identically for the purposes of constitutional analysis reflects this Court's consistent directive that the states cannot require parental consent as a condition before a minor may have an abortion. *Danforth*, 428 U.S. at 74. Analyzing notice and consent requirements with the same careful scrutiny also acknowledges the control parents commonly exercise over their children. *See Bellotti II*, 443 U.S. at 463.Consequently, this Court consistently has struck down statutes which failed to provide an alternative to parental involvement. *See, e.g., Akron*, 462 U.S. at 440-41 *(Akron* ordinance unconstitutional because it did not explicitly create by-pass); *Bellotti II*, 443 U.S. at 463, (Massachusetts statute unconstitutional because state did not provide meaningful judicial alternative.) Thus defendant's argument that the notice requirement is subject to a lesser constitutional standard simply is unsupported by logic, precedent, or fact.[42]

Defendant's further argument that establishing a judicial alternative to parental consultation exhausts the State's constitutional duty to narrowly tailor this statute is without merit. First, Illinois has not established such a constitutional alternative. Even creating a judicial by-pass, however, a state does not discharge *all* of its obligations with respect to the regulation of minors; the under-

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jected notification law to same standard as consent law, recognizing that, "although notification requirements do not give parents the legal power to veto their daughter's abortion decision, as a practical matter they may. . . . [P]arental involvement brought about by either consent or notification statutes may result in similar efforts by parents to block the abortion [.]")

42 As set forth in the Brief *Amici Curiae* submitted on behalf of minors in Minnesota and Massachusetts, at 4, the testimony in *Hodgson*, 648 F. Supp. 756, demonstrates that, from a functional point of view, notice and consent laws operate identically.

lying regulation must still reflect a legitimate state interest and be narrowly drawn. Disregarding this clear standard, defendant argues that compliance with procedural safeguards empowers a state to trample on the rights the safeguards were designed to protect. This hypothesis would allow a state to impose any blatantly unconstitutional regulation on minors, so long as a judicial by-pass were provided. In making this argument, defendant ignores entirely the fundamental nature of the right the state seeks to regulate. Accordingly, the existence of a constitutionally sufficient by-pass procedure would not cure the unconstitutional burdens that flow from the waiting period itself.[43]

Equally unpersuasive is defendant's related argument that the mandatory waiting period does not impose a constitutionally impermissible delay because completing the judicial by-pass would result in a delay longer than 24 hours. This Court long has recognized that the judicial alternative to parental involvement creates its own problems, but nonetheless is necessary to avoid vesting in parents an " 'absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the

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43 *See, e.g., Zablocki v. Redhail*, 434 U.S. 374 (1978), in which this Court held unconstitutional a statute which prohibited certain persons from marrying without prior court approval. The existence of a judicial by-pass of sorts did not negate the underlying constitutional flaw of the statutory requirement. *See also Brown v. Illinois*, 422 U.S. 590 (1975), in which this Court reversed a criminal conviction on the ground that the conviction was based on a statement by the defendant that was the product of an unlawful arrest, notwithstanding the fact that the police had complied with constitutional procedure and had given the warnings required by *Miranda*.

pregnancy.'" *Bellotti* II, 443 U.S. at 643.[44] The alternative, however, never has been intended as a substitute for parental consultation because of the preferability, when possible, of a private and familial rather than judicial resolution of the young woman's abortion decision. *See Bellotti II*, 443 U.S. at 648. For the state to make its notification requirements so onerous that the minor would prefer the difficulties inherent in a judicial proceeding raises a serious question about the sincerity of the state's commitment to parental consultation as a means of effecting the State's "significant" interest in protecting a pregnant minor.

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[44] *Compare Bellotti II*, 443 U.S. at 655 (Stevens, J., concurring)(judicial by-pass "would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent"). The evidence submitted to the trial court confirms the difficulties and stress that result when a minor is required to seek judicial approval of her attempt to exercise a fundamental right. (J. App. 10, 13.) *See also Brief Amici Curiae* submitted on behalf of minors in Minnesota and Massachusetts. Defendant's further suggestion that the Act provides full legal assistance to a minor seeking judicial by-pass is misleading. An attorney is available only after the minor herself has filed the petition for a waiver and, even then, only if the minor specifically requests. Ill. Rev. Stat. ch. 38, ¶ 81-65(b).

CONCLUSION

This Court lacks jurisdiction to entertain defendant's attempt to appeal either issue presented in his jurisdictional statement. Defendant's appeal, with respect to both issues presented, must be dismissed. In the alternative, the judgment below should be affirmed.

Respectfully submitted,

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Dated: February 13, 1987

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APPENDIX A

ILLINOIS PARENTAL NOTICE OF ABORTION ACT OF 1983

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AN ACT relating to notice of abortions performed on minors and incompetents, and to repeal Section 3.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended. P.A. 83-890, veto overridden Nov. 2, 1983, eff. Jan. 31, 1984.

Ill. Rev. Stat. Ch. 38, ¶ 81-61 (1985)

81-61. Short title

§ 1. Short title. This Act shall be known and may be cited as the Parental Notice of Abortion Act of 1983.

Ill. Rev. Stat. Ch. 38, ¶ 81-62 (1985)

81-62. Legislative purpose and findings

§ 2. Legislative purpose and findings. (a) It is the intent of the legislature in enacting this parental notice provision to further the important and compelling State interests of: 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their household.

(b) The legislature finds as fact that: 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor.

Ill. Rev. Stat. Ch. 38, ¶ 81-63 (1985)

81-63. Definitions

§ 3. Definitions. For purposes of this Act, the following definitions will apply:

(a) "minor" means any person under the age of 18;

(b) "emancipated minor" means any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents;

(c) "actual notice" means the giving of notice directly, in person or by telephone;

(d) "abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant with intent other than to cause live birth;

(e) "incompetent" means any person who has been adjudged a disabled person and has had a guardian appointed for her as provided under Section 11a-3(a)(1) or Section 11a-3(3) of the Probate Act of 1975.[1]

[1] Chapter 110½, ¶ 11a-3.

Ill. Rev. Stat. Ch. 38, ¶ 81-64 (1985)

81-64. Notice required

§ 4. Notice required. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion or unless he or his agent has received a written statement or oral communication by another physician, hereinafter called the "referring physician", certifying that the referring physician or his agent has given such notice.

(b) If the minor's or incompetent's parents are divorced, or one parent is not available to the person performing the abortion or his agent or the referring physician or his agent in a reasonable time or manner, then notice to the parent with custody or to the parent who is available shall be sufficient. If neither parent nor the legal guardian is available to the person performing the abortion or his agent or the referring physician or his agent within a reasonable time or manner, notice to any adult person standing in loco parentis shall be sufficient.

(c) A minor or incompetent who objects to notice being given her parents or legal guardian under this section may petition, on her own behalf or by next friend, the circuit court of the county in which the minor resides or in which the abortion is to be performed for a waiver of the notice requirement of this section pursuant to the procedures of Section 5 of this Act.[1]

[1] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-65 (1985)

81-65. Procedure for waiver of notice

§ 5. Procedure for waiver of notice. (a) The requirements and procedures under this Act are available to minors and incompetents whether or not they are residents of this State.

(b) The minor or incompetent may participate in proceedings in the court on her own behalf and the court shall appoint a guardian ad litem for her. The court shall advise her that she has a right to court appointed counsel and shall provide her with such counsel upon her request.

(c) Court proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent. These proceedings shall be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly, but in no case shall the court fail to rule within 48 hours of the time of application, provided that the 48 hour limitation may be extended at the request of the minor or incompetent.

(d) Notice shall be waived if the court finds either:

(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or

(ii) That notification of those to whom Section 4 of this Act[1] requires that notice be given would not be in the best interests of the minor or incompetent.

(e) A court that conducts proceedings under this Section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(f) An expedited confidential appeal shall be available, as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice.

(g) The Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

(h) No filing fees shall be required of any minor or incompetent who avails herself of the procedures provided by this Section.

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-66 (1985)

81-66. Medical emergency exception

§ 6. Medical emergency exception. The requirements of Section 4 of this Act[1] shall not apply when, in the best medical judgment of a physician based on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis of any medical judgment that warrants failure to give notice pursuant to this Act shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. Dissemination of this report shall comply with the reporting and confidentiality requirements of Section 10 of the Illinois Abortion Law of 1975.[2]

Amended by P.A. 83-1128, § 3, eff. June 30, 1984.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-30 of this chapter

Ill. Rev. Stat. Ch. 38, ¶ 81-67 (1985)

81-67. Other exceptions

§ 7. Other exceptions. (a) When the parties to whom notice must be given pursuant to Section 4 of this Act[1] have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit signed notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply.

(b) Notwithstanding any other provision of this Act, no notice need be given to any father of any minor requesting an abortion when the minor's mother accompanies her to the abortion and submits a notarized statement that she has been notified and, further, states orally to the physician or his agent that she has a reasonable belief that the fetus to be aborted is the child of the minor's father. Where the mother is deceased or otherwise unavailable, the physician or his agent may rely on a similar statement provided by any other adult relative accompanying the minor. Any physician or his agent relying on such a statement in good faith shall not be civilly or criminally liable under any provision of this Act for failure to give notice. Nothing in subsection (b) shall be construed to limit the alternative and additional right of a minor to seek a waiver of the notice requirement in accordance with Section 5[2] on the grounds that notice would not be in the best interests of the minor because the fetus to be aborted is the child of the minor's father.

[1] Paragraph 81-64 of this chapter.

[2] Paragraph 81-65 of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-68 (1985)

81-68. Penalty

§ 8. Penalty. Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent, and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a Class A misdemeanor.

Failure to provide persons with information pursuant to the requirements of this Act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

Such prima facie evidence shall not apply to any issue other than failure to inform the parents or guardian and interference with family relations in appropriate civil actions.

Ill. Rev. Stat. Ch. 38, ¶ 81-68.1 (1985)

81-68.1. Invalidity—Severability

§ 8.1. If any provision, word, phrase or clause of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this Act which can be given effect without the invalid provision, word, phrase, clause, or application, and to this end the provisions, words, phrases, and clauses of this Act are declared to be severable.
Added by P.A. 83-1128, § 3, eff. June 30, 1984.

Ill. Rev. Stat. Ch. 38, ¶ 81-69 (1985)

81-69. Repealer

§ 9. Section 3.3 of the "Illinois Abortion Law of 1975", veto overridden November 20, 1975, as amended,[1] is repealed.

[1] Paragraph 81-23.3 (repealed) of this chapter.

Ill. Rev. Stat. Ch. 38, ¶ 81-70 (1985)

81-70. Effective date

§ 10. This Act takes effect 90 days after it becomes a law.

APPENDIX B

State Of Illinois
OFFICE OF THE GOVERNOR
Springfield 62706
September 26, 1983

FILED
3:20 P.M.
SEP. 26 1983
IN THE OFFICE OF
SECRETARY OF STATE

To the Honorable Members of
The Senate
83rd General Assembly

Pursuant to Article IV, Section 9(b) of the Illinois Constitution of 1970, I hereby veto Sentate Bill 521 entitled "AN ACT relating to notice of abortions performed on minors and incompetents, and to repeal Section 3.3 of the Illinois Abortion Law of 1975", overridden November 20, 1975, as amended.

Senate Bill 521 imposes a criminal penalty on any physician who performs an abortion on an unemancipated minor or any incompetent without first notifying both of her parents or legal guardian. A minor who objects to such mandatory notice is required to obtain a judicial waiver. This bill contains many constitutional deficiencies. The most glaring of these deficiences is to be found in the 'waiver of notice' requirement. In a decision handed down on August 26, 1983 by the U.S. Court of Appeals for the Seventh Circuit, the Court was asked to decide the constitutionality of several sections of an Indiana Statute requiring that no physician perform an abortion upon an emancipated [sic] minor without first notifying the minor's parents (same as Senate Bill 521). In particular, was challenged the constitutional sufficiency of the procedures established by the statute whereby an unemancipated minor may petition for waiver of the notification requirement on the grounds that she is mature enough to make the abortion decision on her own or that, even if immature, waiver of notification is in her best interests. The statute had been upheld by the district court.

In reversing the judgment of the District Court the U.S. Court of Appeals for the Seven[th] Circuit ruled: "The statute contains no severability clause and, more importantly, the constitutionality of the general notification provision is dependent upon the adequacy of the waiver-of-notificaton procedures the state has established. The state may not require any minors to notify their parents until it has enacted a statute providing for constitutionally adequate waiver procedures".

To be constitutional, a statute requiring parental involvement in a minor's abortion decision "must provide an alternative procedure through which a minor may demonstrate she is mature enough to make her own decision or that the abortion is in her best interests." *City of Akron v. Akron Center for Reproductive Health, Inc.*, ___U.S. ___, 51 U.S.L.W. at 4767, 4707, n.10. (1983) (hereafter "*Akron*"). The alternative procedure, or judicial bypass, must also meet stringent constitutional standards. The judicial bypass "*must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.*" *Bellotti v. Baird*, 493 U.S. 622, 644 (1979). [Emphasis supplied] [emphasis by Governor].

Until these standards are addressed I must withhold my approval of this legislation.

For these reasons, I veto Senate Bill 521.

Sincerely,

James R. Thompson
GOVERNOR

[Signature omitted in printing.]

APPENDIX C

STATE OF ILLINOIS
EIGHTY-FOURTH GENERAL ASSEMBLY
SENATE

Senate Joint Resolution No. 69

Offered by Senator LeRoy W. Lemke

WHEREAS, In the recent case of Zbaraz V. Hartigan [sic], the United States Court of Appeals for the Seventh Circuit enjoined enforcement of the Illinois Parental Notice of Abortion Act of 1983; and

WHEREAS, According to this court decision, it is necessary for the Illinois Supreme Court to promulgate rules to assure expedited and anonymous appeals from decisions concerning the maturity of a minor to decide to undergo an abortion in order for the Act to take effect; and

WHEREAS, The Illinois Constitution prohibits the state legislature from making specific rules governing appellate procedure; therefore, be it

RESOLVED, BY THE SENATE OF THE EIGHTY-FOURTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, THE HOUSE OF REPRESENTATIVES CONCURRING HEREIN, that we respectfully urge the Supreme Court of Illinois, as soon as may be practicable, to promulgate rules for confidential and speedy appeals from proceedings at which a minor may prove her maturity or that, if she is immature, an abortion is in her best interests, in order for the Illinois Parental Notice of Abortion Act of 1983 to be enforced; and be it further

RESOLVED, That a suitable copy of this preamble and resolution be presented to each Justice of the Supreme Court of Illinois.

Adopted by the Senate, June 27, 1985.

_____
President of the Senate

_____
Secretary of the Senate

Concurred in by the House of Representatives, July 1, 1986.

_____
Speaker of House of Representatives

_____
Clerk of House of Representatives

[Signatures omitted in printing.]

REPLY BRIEF

No. 85-673

Supreme Court, U.S.
FILED
MAR 25 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and **RICHARD M. DALEY**, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and **ALLAN G. CHARLES, M.D.**, individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR APPELLANT NEIL F. HARTIGAN

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In The

Supreme Court of the United States

October Term, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and **RICHARD M. DALEY**, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and **ALLAN G. CHARLES, M.D.**, individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR APPELLANT NEIL F. HARTIGAN

I.

THIS COURT HAS JURISDICTION TO HEAR THIS CASE EITHER UNDER ITS APPELLATE JURISDICTION OR BY GRANTING A WRIT OF CERTIORARI.

Appellees mounted a pre-enforcement, facial challenge to the Illinois Parental Notice of Abortion Act. They sought and obtained from the District Court a permanent injunction and a final judgment declaring the Act unconstitutional. (J.S. App. 54; 584 F.Supp. 1452) On appeal, they were awarded substantially similar relief: a majority of the panel struck down § 4's waiting period and § 7(a), severed those provisions, and enjoined enforcement of the Act. It found § 5's by-pass procedures constitutionally inadequate without supplementary state court rules. (J.S. App. 1; 763 F.2d 1532)

In spite of these rulings and Appellees' haste to prevent the Act from operating, they now urge this Court to decline review because the Act is "incomplete." They argue that this factor prevented the Court of Appeals from entering a final judgment, thereby defeating mandatory jurisdiction under 28 U.S.C. § 1254(2), (Plt. br. 13-16)[1] and likewise bars this Court from exercising discretionary jurisdiction under 28 U.S.C. § 1254(1) by rendering the case unripe. (Plt. br. 26-29)

These arguments overlook the real nature of the Court of Appeals' decision, the impact of *Thornburgh v. American College of Obstetricians and Gynecologists*, ____ U.S. ____, 106 S.Ct. 2169 (1986), and this Court's order of October 14, 1986, which limited review to the constitutionality of the waiting period.

Appellant sought review of a judgment which barred enforcement of the Illinois Act. In order to preserve his

---

[1] References to Appellees' brief appear as (Plt. br. ____). Citations to Appellant's opening brief are made as (Def. br. ____).

right to appeal under § 1254(2), he was required to file his notice of appeal within ninety days from the date on which the judgment was entered. 28 U.S.C. § 2101(c). The notice of appeal was timely filed, and the jurisdictional statement asked the Court to consider all of the questions decided. (J.S. i)

Nearly eight months after this case was docketed, the Court decided *Thornburgh*, confining its jurisdiction under § 1254(2) to appeals taken from final judgments. Subsequently, the Court entered an order, partitioning this case by restricting review to the question of the constitutionality of the waiting period. Thus, it is not the "incompleteness" of the Act which forecloses review of all of the challenged provisions, as Appellees maintain, but the order confining the field of issues to be addressed on the merits.

In light of that order, Appellant has shown that the judgment pertaining to the waiting period was final under the most rigid construction of that requirement. (Def. br. 22-30) He has established, moreover, that the judgment when viewed as a whole complied with that requirement.[2] (Def. br. 30-34)

A. The Seventh Circuit Entered A Final And Appealable Judgment Under 28 U.S.C. § 1254(2).

In their attack on the finality of the Court of Appeals' decision, Appellees recognize that "[n]o single formula . . . can fully explain the finality doctrine." (Plt. br. 16) Yet, they attempt to reduce this complex doctrine to two "exceptions" and then purport to pigeonhole the myriad cases applying it into those categories. (Plt. br. 16-22) Thus,

[2] Significantly, in Appellees' motion to dismiss or affirm, they did not contest jurisdiction on either of the grounds they now raise. (Motion to Dismiss or Affirm, at 6-25) Had the "incompleteness" of the Act operated so clearly to obstruct the Court's appellate jurisdiction, it is surprising that this objection was not presented earlier.

while paying lip service to the malleability of the finality requirement, Appellees urge a rigid application of it in this case. In so doing, they emphasize only one "of the considerations that always compete in the question of appealability," *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950), focusing almost exclusively on the potential for further appeals.[3]

The Court's decisions make clear, however, that while significant, the prospect of future appeals implicates only one component of the analysis. There are other competing policies which also require evaluation before an appeal will be dismissed for lack of finality and those policies depend upon the purposes intended to be fulfilled by the grant of jurisdiction.

Section 1254(2) serves as a compliment to 28 U.S.C. § 1257, "put[ting] the two on perfect parity [by] allowing a writ of error from the circuit court of appeals under conditions exactly the same, except reversed. . . ." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 675 n.11 (1974) (quoting F. Frankfurter & J. Landis, THE BUSINESS OF THE SUPREME COURT 277-78 (1928)). Whereas § 1257 was designed to check state court action that paid inadequate attention to federal interests, § 1254(2) aims at ensuring that federal courts do not improperly interfere with state legislative programs. *Compare Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483-86 (1975) *and* cases cited therein *with City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976).

[3] Several times, Appellees refer to future appeals which draw into question the constitutionality of the Act as applied. (Plt. br. 12 n.8, 17 n.14, 23) If they mean to suggest that Appellant is required to delay his appeal until the Act is invalidated as applied, the suggestion cannot be taken seriously. Section 1254(2) allows an appeal whether a statute is stricken on its face or in its application. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471 n.12 (1985).

This reversal of functions and the forum from which the appeal proceeds are significant. While many of the factors that guide the finality determination under § 1257 may be relevant to the finality issue under § 1254(2), the weight they deserve in those distinct contexts is not necessarily the same. Therefore, *Cox* and other decisions interpreting § 1257 are informative in identifying the concerns that arise whenever an appeal is taken from an order that anticipates further lower court proceedings. However, contrary to Appellees' position, those decisions do not provide an unalterable rule that is automatically transferable to this context.

Comity concerns, which are significant in both situations, take on a substantially different configuration when review is sought from a federal decision invalidating a state statute. The federal decision itself interrupts the state program and introduces a rift in federal-state relations. Prompt resolution of the controversy may restore the legislative program or, in the least, provide clear guidance as to what actions are constitutionally prohibited in the future. *City of New Orleans v. Dukes*, 427 U.S. at 302.

A mechanical application of § 1257 precedents in this context is unwarranted also because under § 1254(2), the appeal arises in a unitary court system. While comity presents a powerful justification for not interfering in state court proceedings, it does not impose the same constraints upon review of federal court decisions.[4] As evidenced by statute, 28 U.S.C. §§ 1254(1), 1292; court rule, Fed. R. Civ.

[4] Decisions such as *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948) and *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), upon which Appellees rely do not dictate the result in this case. Each was an eminent domain case brought to this Court before all of the matters necessary to support the claim had been resolved in state court. In similar settings, the Court has permitted appeals even without resolution of all the issues when the case arises in the federal courts. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373 (1945).

P. 54(b); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1956); and this Court's decisions, *e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), notions of sound judicial administration often combine with other important federal interests to override a rigid rule requiring that the litigation be completely terminated before a federal court decision is considered final.[5]

For example, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, the Court frankly acknowledged that "review of this case . . . could be called 'piecemeal.'" *Id.* at 153. Nevertheless, it reasoned that the cost and inconvenience of trying the case were not increased when the Court of Appeals resolved the issue presented instead of first remanding the case for trial.

In this case also the risk of piecemeal appeals is not of sufficient force to delay review. Like the stricken claims in *Gillespie*, the ruling on the waiting period and § 7(a) constitutes a distinct aspect of this litigation which will not be reheard. By holding those provisions invalid and severing them, the Court of Appeals made a conclusive

[5] Despite the contrary suggestion, Appellant has never maintained that the decision in this case qualified as a final decision under the collateral order doctrine. (Plt. br. 19-20) Nevertheless, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and other decisions in that area are relevant to the issue presented here.

They demonstrate the flexibility of the finality doctrine as guided by the purposes for the grant of jurisdiction. In addition, they treat the finality requirement in the context of a unitary court system. Thus, to the extent that the finality determination rests upon promoting sound judicial administration, those concerns are equally applicable in this context. Indeed, in that regard, decisions interpreting finality for purposes of 28 U.S.C. § 1291 may have greater force in defining finality under § 1254(2) than decisions interpreting the similar requirement in § 1257, which must also take into account proper respect for the integrity of a separate court system. 15 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3809, at 439 (1976).

and final determination of their constitutionality.[6] That constitutional question will remain alive and, provided an avenue for review is available later, it will be sought, duplicating efforts expended and cost incurred already.

On the other hand, there is no assurance that "another *appeal* is all but inevitable," as Appellees maintain. (Plt. br. 23) (emphasis added) If court rules are promulgated and upheld in the lower courts, any review of that decision will be subject to this Court's discretionary jurisdiction. Section 1254(2) only allows an appeal as of right from decisions *invalidating* a state statute.[7]

As in *Gillespie*, review at this point may advance the progress of the litigation. By disposing of this question,

[6] Appellant has shown that, in a number of settings, a judgment which operates to adjudicate definitively a distinct claim which will not be subject to redetermination or revision constitutes a final decision. (Def. br. 20-30) *Gillespie* represents but one example. Others arise when a district court enters judgment under Fed. R. Civ. P. 54(b). *See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980). But even when construing § 1257, the Court has viewed some cases as "a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126 (1945). With respect to the waiting period, the Court of Appeals' judgment falls within that category.

[7] Appellees' contention that the constitutionality of the waiting period can be reviewed at the end of the entire litigation is accurate only if the judgment entered by the Court of Appeals was not final. If the judgment was final and Appellant neglected to take his appeal within the requisite ninety days, 28 U.S.C. § 2101(c), his right to appeal would have been lost. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) and *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916), are not helpful in resolving the critical issue in this case. (Plt. br. 21-22) In those cases, an earlier attempt to seek review by way of certiorari jurisdiction before a final judgment or decree entered did not preclude review at the end of the litigation. Here, the pivotal question is whether the judgment was in fact final, obliging Appellant to appeal in the time prescribed.

only the constitutionality of the by-pass procedures will remain at issue. The responsibility of the Illinois Supreme Court will thus be unobstructed. It may act without fear of interfering with ongoing litigation.

B. Since This Case Is Ripe For Review, The Requirements Of Article III Do Not Prevent The Court From Granting A Writ Of Certiorari.

There is nothing speculative about the harm that has occurred in this case. Appellant is prevented from enforcing the Act until supplementary state court rules are enacted and survive constitutional examination. Even if the injunction is dissolved, the waiting period will remain unenforceable. Thus, Illinois will never be able to give effect to its statute as written.[8]

[8] None of the cases upon which Appellees rely involve circumstances analogous to those presented in this case. In most of those cases, the plaintiffs had not yet been subjected to the harm of which they complained. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Warth v. Seldin*, 422 U.S. 490 (1975); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *State Farm Mutual Automobile Insurance Co. v. Dole*, 802 F.2d 474 (D.C. Cir. 1986). Their injury might never have materialized and hence was remote or contingent upon further developments.

Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967), is of a similar nature. A writ of certiorari was sought to review a court of appeals' decision to remand the case for a determination whether a contempt had in fact occurred. Therefore, like the plaintiffs in the cases cited above, but unlike Appellant in this case, the defendant's injury had yet to materialize. The proceedings on remand might have rendered the earlier contempt a nullity. No such action can occur in this case.

Nor does Appellant stand on equal footing with the defendants in *Diamond v. Charles*, ___ U.S. ___, 106 S.Ct. 1697 (1986), or *Muscrat v. United States*, 219 U.S. 346 (1911). *Diamond* makes clear that, as the chief law enforcement officer, Appellant retains a unique interest in defending state laws. In contrast to Illinois' position, in *Muscrat*, the United States, while nominally a party, had no real interest in the outcome of the litigation. *Id.* at 360-61.

Following *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), or *City of El Paso v. Simmons*, 379 U.S. 497 (1965), the Court could have agreed to review both questions Appellant presented to it. (J.S. i) The Court of Appeals' disposition of the constitutionality of the waiting period and the facial adequacy of the by-pass procedures when read in conjunction with existing Illinois Supreme Court rules of appellate practice posed substantial federal questions meriting review.[9] (J.S. 12-16; 22-23) Appellees

[9] Appellees suggest that the Court of Appeals' disposition of § 5 was predicated on state law. (Plt. br. 14-15 & n.11; 24-25 n.21) There is no basis for that suggestion and the cases cited are wholly inapposite.

The Court of Appeals did note that the Illinois Constitution prohibited the General Assembly from enacting appellate rules. (J.S. App. 13, 19-20; 763 F.2d at 1540, 1544) However, the majority found the Act's by-pass provisions inadequate on their face solely because they did not comply with what the majority interpreted *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983), to require as a constitutional matter. (J.S. App. 12-14, 19; 763 F.2d at 1540-41, 1543-44) Similarly, the majority refused to find existing appellate rules to be sufficient when measured against *Ashcroft*. (J.S. App. 15-16; 763 F.2d at 1541-42)

Furthermore, the majority's decision to allow the State Supreme Court an opportunity to promulgate supplementary rules was guided by *Ashcroft* and the Third Circuit's decision in *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, ___ U.S. ___, 106 S.Ct. 2169 (1986), not the intent of the Illinois legislature. (J.S. App. 13-14, 18-20; 763 F.2d at 1540-41, 1543-44) The fact that the Court of Appeals refused to abstain and certify questions of state law to the Illinois Supreme Court, as Appellant requested, merely underscores the frailty of Appellees' position. (*See* Brief and Argument for Defendant-Appellant Hartigan, 34-35; Reply Brief for Defendant-Appellant Hartigan, 26-27) Thus, Appellees are incorrect when they state that this Court would be obliged to resolve questions of state law if it examined the constitutionality of § 5.

This case bears no resemblance to *Public Service Commission of Indiana v. Batesville Telephone Co.*, 284 U.S. 6 (1931), or *Huddleston v. Dwyer*, 322 U.S. 232 (1944), in which the decisions appealed depended upon principles of state law. And *Silkwood v. Kerr-*

(Footnote continued on following page)

should not now be permitted to invoke this Court's order confining review to only one of the questions to delay review or prevent it altogether.[10]

The constitutionality of the waiting period presents a question of law. Its resolution does not depend upon additional evidence that will be submitted on remand and it is not subject to reexamination by the lower courts. The decision to sever the waiting period and § 7(a) ensures that much. Moreover, the character of the inquiry necessary to resolve that issue is unrelated to the questions posed in determining the adequacy of the by-pass procedures. Had there been such interdependence, the Court of Appeals would not have been justified in conclusively invalidating the waiting period while remanding a portion of the case.

In this regard, the error in Appellees' assertion that *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947), "presents a situation so parallel to the instant one as to control its disposition" is manifest. (Plt. br. 27) In *Rescue Army*, both the ordinance on its face and the lack of clarity in the lower court proceedings made it impossible for this Court to ascertain precisely what provisions were challenged and what constitutional issues were presented to it. *Id.* at 575.

[9] *continued*
McGee Corp., 464 U.S. 238 (1984), merely involved "an exercise of authority under state law . . . without reference to the state statute." *Id.* at 247. Here, the Act itself was drawn into question.

Even if state law had provided a basis for the decision on § 5, however, there would be no impediment to this Court's review of the decision invalidating the waiting period. The Court may decline to hear a portion of a case which rests partially on state law but maintain jurisdiction to review another provision of the same statute held to violate the federal constitution exclusively. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982).

[10] The Court could agree to review both questions and vacate the injunction, thereby eliminating Appellees' concerns that the questions are not ripe for review.

In contrast, § 4(a) of the Illinois Act, in which the waiting period is found, refers to no other provision. Indeed, § 4(c), which allows a minor to exempt herself from the requirements in § 4(a), speaks in terms of objecting to notice, not the waiting period. In addition, unlike *Rescue Army*, in this case, the lower court's decision precisely delineates the provisions under attack and expressly separates those which will never be entertained again much less revised by the receipt of evidence.

While the Act remains enjoined, none of its provisions, including the waiting period, may operate. But this is hardly an argument that Appellant's injury is abstract or uncertain. Rather, it emphatically underscores the hardships that the Court of Appeals' decision, combined with this Court's decision to review only one of the questions, imposes upon him.

Under the Court of Appeals' decision, the Act cannot go into effect without supplementary rules. Those rules must be enacted by the Illinois Supreme Court. ILL. CONST. of 1970, art. VI, § 16. Appellant is, therefore, precluded from taking affirmative action that would eliminate the strictures of the injunction that now binds him. He must obey it even if it was erroneously entered. *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 439 (1976). Although this Court's order of October 14, 1986 prevents review of the propriety of the injunction, the obstruction to Appellant's full performance of his responsibilities and to the implementation of the Act's provisions continues unabated.

The promulgation of constitutionally sufficient rules governing by-pass procedures will not eliminate all of the injury. If the injunction is dissolved, the Act will go into effect without the waiting period and § 7(a). Appellant will then be required to return to this Court to seek reversal of the very question that is now presented to it.

Furthermore, the hardships caused by postponing review in this case are not confined to obstructing Appellant's constitutional duties or to preventing the Act from operating. The pendency of this litigation and the protracted uncertainty of the issues to be addressed on appeal may well have impeded the Illinois Supreme Court in comprehending the necessity for, or the advisability of, enacting supplementary rules.[11] (Def. br. 28-29)

This Court, therefore, is not called upon to entangle itself in an abstract disagreement—the primary mischief the ripeness doctrine is designed to avoid. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 105 S.Ct. 3325, 3333 (1985); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 200 (1983). The controversy is real and the impact of the injury felt. Postponing review can only result in further hardships and obstructions to the resolution of this case.

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[11] In his opening brief, Appellant discussed the impact that this litigation has had upon the full implementation of the Act, particularly with regard to the Illinois Supreme Court's promulgation of rules. (Def. br. 28-29) While Appellees interpret the failure of that Court to take action as evidence of "a dispute between separate branches of the government," (Plt. br. 24) there is no support for that suggestion.

The Resolution, which they appended to their brief, was passed by the Senate on June 27, 1985 and by the House on July 1, 1986. (Plt. br. App. 10c) On both of those dates, the jurisdictional papers, which raised the issue of the facial validity of the Act's by-pass procedures were pending before this Court. It was not until October 14, 1986, more than four months after the House passed the Resolution, when this Court entered its order limiting review to the first question, that the scope of these proceedings was clarified. To interpret these facts as indicative of an intra-state dispute is to disregard the history of this litigation.

In addition, Appellees' claim that this Court has faith in the ability of the Illinois Supreme Court to apply its constitutional decisions is no answer to Appellant's argument. (Plt. br. 25 n.22) The point is not that the Illinois Supreme Court is unable to interpret this Court's decisions but that the existence of this litigation has made its role unclear. (Def. br. 28-29)

II.

THE WAITING PERIOD IS A CONSTITUTIONALLY PERMISSIBLE MEANS TO PROMOTE THE STATE'S LEGITIMATE INTEREST IN ENSURING THAT A MINOR'S ABORTION DECISION IS MADE IN CONSULTATION WITH HER PARENTS.

Appellees erroneously equate the right of a minor child to obtain an abortion with that of an adult woman. In so doing, they attempt to wrest this case from the application of the relevant legal standards governing state regulation of a minor's abortion decision.

The presumed inferior capacity of minors accounts for allowing the state to impose limitations upon their freedom to make important choices. *See Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (*Bellotti II*) (plurality opinion); Hafen, *Children's Liberation And The New Egalitarianism: Some Reservations About Abandoning Youth To Their "Rights,"* 1976 B.Y.U. L. Rev. 605, 644-50. The urgency and irrevocability of the choice whether to continue or terminate a pregnancy, however, prevent the presumption from operating as to all minors. *Bellotti II*, 443 U.S. at 642. So, the State must offer an avenue for a minor to lift the presumption in her individual case. If it does, the State may rely on the presumption and enact laws that aim at involving a minor's parents to assist her in making her choice.

The Constitution does not require that the aim be perfect. It must only come close to the mark.[12] *See H.L. v.*

[12] Appellant has never maintained that the mere rationality standard provides the appropriate level of scrutiny in this context. Appellees' assertion, then, that this analysis allows the State to run roughshod over minors' constitutional rights is unwarranted. (Plt. br. 49) Allows the State some latitude permits it to accommodate all of the private and governmental interests at stake. The intermediate level of review which the Court has employed, *Matheson*, 450 U.S. at 412-13; *Carey v. Population Services International*,

(Footnote continued on following page)

Matheson, 450 U.S. 398 (1981); Buchanan, *The Constitution And The Anomaly Of The Pregnant Teenager*, 24 Ariz. L. Rev. 553, 592-98 (1982).

A. The Waiting Period Imposes No Greater Burden Upon A Minor's Right To Obtain An Abortion Than The Consent Requirement Upheld In *Ashcroft*.

The determination of whether a regulation imposes an *undue* burden upon the right to obtain an abortion cannot be made in a vacuum without reference to the competing interests that are implicated. It does not depend upon a subjective evaluation of the hardships that the regulation may impose, but upon the force of the right and the force of the interests that may justifiably confine it. *See Matheson*, 450 U.S. at 411; *id.* at 418-19 (Powell, J., concurring); *id.* at 421 (Stevens, J., concurring).

In *Bellotti II*, *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), the Court weighed these factors and concluded that a state could prevent a minor from obtaining an abortion without parental consent or judicial waiver of that requirement. The cost and delays associated with the consent requirement upheld in *Ashcroft* are likely to impose greater impediments to the minor's ability to exercise her right to obtain an abortion than the waiting period in the Illinois Act. Nevertheless, in *Ashcroft*, that more restrictive provision withstood constitutional scrutiny.[13]

[12] *continued*
431 U.S. 678, 692-93 & n.15 (1977) (plurality opinion); *id.* at 709-10 (Powell, J., concurring opinion), and which this Act survives, will adequately ensure that minors' rights are not abandoned to regulatory caprice.

[13] The contention that notice and consent requirements impose the same burdens upon a minor is not self-evident. (Plt. br. 47)

(Footnote continued on following page)

Under the Illinois Act, the minor child must wait only twenty-four hours after her parents are notified. Under the Missouri statute, she had to wait until she obtained parental consent, a period that could extend well beyond the time needed to comply with the Illinois Act.

If, as Appellees maintain, an Illinois minor would be forced to make two trips to the abortion facility because the necessary information regarding confirmation of her pregnancy and the need to inform her parents could not be given over the telephone, those circumstances would seem to create similar obstacles for a Missouri minor. (Plt. br. 37) In Missouri, the physician had to secure the informed written consent of the minor and of one parent before the abortion was performed. *Ashcroft*, 462 U.S. at 478 n.4 (quoting Missouri Rev. Stat. § 188.028 (Supp. 1982)). If the physician performing the abortion was unable to use the telephone to tell the minor that she was pregnant and supply the information necessary to make her and her parent's consent informed, it would seem that she and her parent would be required to travel to his office either initially or a second time.[14] Despite these poten-

[13] *continued*
The Court has never expressly held that a parental notice provision must be accompanied by by-pass procedures. Moreover, a notice requirement does not permit a parental veto. As Justice Stevens observed in *Matheson*: "Almost by definition, . . . a woman intellectually and emotionally capable of making important decisions without parental assistance also should be capable of ignoring parental disapproval." 450 U.S. at 425 n.2.

[14] *Amici* acknowledge the need for counseling and for allowing the adolescent sufficient time in which to make her abortion decision. They state that a number of abortion providers schedule pregnancy testing and counseling on a different day from the abortion procedure. (Brief of *Amici Curiae* American Public Health Association, et al. 28-29 & n.18)

The advisability of this practice is unassailable and further illuminates the important interests promoted by the waiting period. The counseling the minor receives from the provider may supply in-

(Footnote continued on following page)

tials for increased cost and delays, the minor's right was not unduly burdened. *Ashcroft*, therefore, forecloses Appellees' argument that the waiting period places unconstitutional impediments to a minor's right to obtain an abortion.

B. The Waiting Period Is A Necessary Supplement To Parental Notice In Order To Ensure That Consultation Occurs.

A young teenager faced with the prospect of pregnancy and the urgent need to make difficult decisions about her options is inevitably subject to emotional distress and psychological hardship. Indeed, Appellees report that the twenty-four hour period immediately before the abortion is frequently the time of greatest anxiety. (Plt. br. 34-35) Moreover, studies have shown "that teenagers are at a higher risk than older women of suffering short-term psychological sequelae after induced abortion." Cates, *Adolescent Abortions In The United States*, 1 J. Adolescent Health Care 18, 22 (1980); *see also* National Research Council, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY AND CHILDBEARING 195-96 (National Academy Press 1987). Parental support and guidance can assist in ameliorating those hardships. Cates, *supra*, 1 J. Adolescent Health Care at 22.

Yet, a teenager may arrive at the abortion facility, be tested for pregnancy, and have her worst fears confirmed

[14] *continued*
formation that she and her parents will find helpful in deciding which course to choose. If the counseling and the abortion occur on the same day, any notice provided to parents without an opportunity for discussion will be meaningless in advancing the goal of parental participation. Of course, if both parents accompany their daughter to the medical facility or acknowledge by their sworn statements that such discussion has occurred, as permitted in § 7(a) of the Act, the goal of parental participation is fulfilled and the waiting period is no longer necessary.

by a report of positive results. On the same day, she may make the decision to have an abortion and submit to the procedure. (Brief of *Amici Curiae* American Public Health Association, et al. 29 n.18) *See also* Markoff Affidavit. (J. App. 13) This scenario depicts clearly the need for allowing parents a short period in which to consult with their daughter. At precisely the point when their care, counsel, and support may be most significant, both parents and their child can be deprived of this opportunity by an eleventh hour phone call.

Without a waiting period, medical personnel are entrusted with providing the necessary counseling and advice. No matter how dedicated, they are inadequate substitutes for those who have raised and nutured the child. *Matheson*, 450 U.S. at 409-10; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring). In addition, notwithstanding Appellees' contention, the physician's relationship with his minor patient does not take precedence over state and parental interests. (Plt. br. 36, 40) *Matheson*, 450 U.S. at 420 n.10 (Powell, J., concurring). *See* Hafen, *supra*, 1976 B.Y.U. L. Rev. at 648.

C. The Act Is Tailored To Accommodate All Of The Interests At Stake When A Minor Seeks To Terminate Her Pregnancy.

Appellees' argument that the waiting period interferes with familial relationships is unpersuasive. (Plt. br. 42-44) The State of Illinois takes no position on the ultimate outcome of the decision. Its interest, rather, is in the process by which the decision is made. Note, *Parental Consent Requirements And Privacy Rights Of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1013-14 (1975). The family is free to implement the decision immediately by complying with § 7(a) or by waiting twenty-

four hours after they are informed of the physician's intent to proceed with the abortion.[15]

Moreover, § 7(a) does not impose additional burdens on the minor or her family. The presence of her parents or their sworn statements merely offers assurance that consultation has taken place in advance of the abortion. The course outlined in § 7(a), contrary to Appellees' argument and the Court of Appeals' decision, is not an additional requirement. (J.S. App. 9; 763 F.2d at 1538; Plt. br. 44-46) It merely provides an alternative avenue for satisfying the Act's objectives.[16]

Nor does the two-parent notification requirement create an unconstitutional burden. Section 4(b) permits notice to one parent if the other is not available "in a reasonable time or manner." And if neither can be contacted, the physician may notify "any adult person standing in loco parentis." Thus, when one parent has abandoned the family and cannot be found, he would not be available within

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[15] There is no unjustifiable inconsistency between § 4's requirements and other Illinois statutes that allow a minor to consent to other health care decisions related to pregnancy. Presumably by the time a minor seeks treatment for her pregnancy, she will have made already the important decision to bear a child. Under Illinois law she may consent to treatment necessary to carry out that decision in a way that will benefit her and her fetus. (Ill. Rev. Stat. ch. 111, ¶ 4501 (1985). In light of the important State interests in the minor's health and in protecting potential human life, parental involvement, while important, is not so pressing as when the minor is confronted initially with the choice to terminate her pregnancy. The State does exact a waiting period, however, when other irrevocable decisions related to parenthood are about to be made. For example, consent to adoption cannot be given until 72 hours after the birth of the child. Ill. Rev. Stat. ch. 40, ¶ 1511 (1985).

[16] Appellees' suggestion that notarized statements jeopardize the family's confidentiality is unsupportable. There is no requirement that the notary view the content of the statement. He must merely determine that the signature on the document belongs to the person appearing before him. Ill. Rev. Stat. ch. 102, ¶ 206-102(c) (1985).

a "reasonable time or manner." Notice would not be required.[17]

On the other hand, if both parents have demonstrated an interest in their daughter's upbringing, it would be potentially destructive of family relations to eliminate one of them from participating in a decision that may profoundly affect his or her daughter's life. Indeed, the two-parent requirement is perfectly consistent with the State's policy as reflected in related areas. *See, e.g.*, Ill. Rev. Stat. ch. 40, ¶ 203 (1985) (requiring both parents' permission to marry unless one cannot be located after "diligent efforts"); Ill. Rev. Stat. ch. 40, ¶ 1015 (1985) (exempting non-consenting spouse from obligation to pay for minor's abortion as family expense). However, if notification to one parent places the other or the minor at risk, the by-pass procedures are available. Certainly, in such circumstances, the minor's best interests would dictate that notice should be eliminated.

The Illinois Act strives to accommodate the varied interests that arise when a young girl is faced with the significant choice of continuing or terminating her pregnancy. Its provisions are molded to allow the minor to carry out that decision and, at the same time, ensure that it is made wisely. The waiting period affords her parents a real opportunity to participate in this significant choice and enhances the likelihood that it will be made properly.

[17] The reasonableness requirement in this provision is not ambiguous merely because it requires a physician objectively to assess the feasibility of notice under the circumstances. (Plt. br. 46 n.40) In *Matheson*, the Court apparently found no constitutional flaw in the Utah statute requiring parents to be notified "if possible" when the state court interpreted that clause to mean "if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification." 450 U.S. at 405 (quoting *H.L. v. Matheson*, 604 P.2d 907, 913 (Utah 1979)). Moreover, this flexible standard is necessary to accommodate the interests of the minor, the state, and the parents.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in Appellant's brief, this Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. § 1254(2) or, alternatively, by granting a writ of certiorari. Appellant requests this Court to reverse the judgment holding unconstitutional the waiting period and § 7(a).

Respectfully submitted,

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SUPPLEMENTAL

BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF APPELLANT NEIL F. HARTIGAN

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JURISDICTION POSTPONED OCTOBER 14, 1986

QUESTIONS PRESENTED

1. Whether the Court of Appeals entered a final judgment under 28 U.S.C. § 1254(2) when it held unconstitutional two provisions of the Illinois Parental Notice of Abortion Act of 1983, severed them, and permanently enjoined their enforcement and when it enjoined the entire Act until the Illinois Supreme Court promulgates rules to supplement the Act's judicial by-pass procedure based on its finding that the Act could not operate constitutionally without such rules.

2. Whether the judicial alternative to parental notification contained in § 5 of the Act provides a constitutionally sufficient framework for ensuring a confidential by-pass procedure and an expeditious appeal from the denial of a petition for waiver of parental notice.

3. Assuming *arguendo* that § 5 does not meet the constitutional standards applicable to parental consent statutes, whether the Constitution mandates an alternative procedure when a statute only requires parental notification.

PARTIES

The defendants below, Neil F. Hartigan, in his official capacity as Attorney General of the State of Illinois, his agents and successors, and Richard M. Daley, in his official capacity as State's Attorney of Cook County, Illinois, his agents and successors, and as the representative of all Illinois state's attorneys, are appellants herein. The plaintiffs below, David Zbaraz, M.D., and Allan G. Charles, M.D., on behalf of a class of physicians similarly situated, and on behalf of their minor patients, are appellees herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF APPELLANT NEIL F. HARTIGAN

OPINIONS BELOW

(See Brief of Appellant at pp. 1-2)

JURISDICTION

(See Brief of Appellant at pp. 2-3)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited in the Brief of Appellant at pp. 3-4, App. 1-App. 9, the following statutes are relevant:

Ill. Sup. Ct. R. 303(a)(4) (Ill. Rev. Stat. ch. 110A, ¶ 303(a)(4) (1985)):

> **Rule 303. Appeals from Final Judgments of the Circuit Court in Civil Cases**
>
> (a) Time; Filing; Transmission of Copy.
>
> * * *
>
> (4) Within five days after the filing of a notice of appeal, or an amendment of a notice of appeal filed in the circuit court pursuant to subparagraph (c)(4) of this rule, the clerk of the circuit court shall transmit to the clerk of the court to which the appeal is being taken a copy of the notice of appeal or of the amendment.

Ill. Sup. Ct. R. 311 (Ill. Rev. Stat. ch. 110A, ¶ 311 (1985)):

> **Rule 311. Accelerated Docket**
>
> Any time after filing the docketing statement in the Appellate Court, the parties may agree to have their case placed on an accelerated docket. The agreement shall be in the form of a motion signed by an attorney for each party and may provide for submission of an agreed statement of facts in lieu of a record, and memoranda in lieu of formal briefs. The court may then enter an order setting forth an expedited schedule for the disposition of the appeal.

STATEMENT OF THE CASE

A complete statement of the case is set out at pages 4 through 13 of appellant's opening brief.

After briefing in this case was completed and oral argument scheduled, on March 30, 1987, this Court entered an order deferring oral argument until a later date. Subsequently, on April 7, 1987, the Court ordered the parties to file supplemental briefs addressing the second question presented in the jurisdictional statement and the question whether the Court of Appeals rendered a sufficiently final decision under 28 U.S.C. § 1254(2) to permit this Court to review both questions presented. The text of this order appears in the Appendix to this brief.

SUMMARY OF THE ARGUMENT

A. Appellant is entitled to invoke this Court's jurisdiction under 28 U.S.C. § 1254(2). The Court of Appeals finally and conclusively adjudicated all of the constitutional issues presented to it. By striking down the waiting period and § 7(a) and severing those provisions, the decision ensures that the Act will never operate as intended. In addition, the only way that the Act will ever operate at all is if the Illinois Supreme Court enacts supplemental rules. There will be no reexamination of the facial adequacy of § 5 without them.

As this case reaches this Court, the order restraining the Act is no different from any permanent injunction.

It may be lifted only if conditions change which render it unnecessary. Since the Illinois Supreme Court has never promulgated rules, no such changed conditions exist. Faced with closely analogous situations in *Organization For A Better Austin v. Keefe*, 402 U.S. 415 (1971) and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court did not hesitate in finding finality.

Moreover, no avenue is available to appellant to lift the injunction. He cannot compel the Illinois Supreme Court to enact additional rules and, therefore, he could be prevented from ever obtaining review of the decision in this Court. *See Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989 (1987); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Even if proceedings on remand were to occur, they could not affect the resolution of the issues already presented to the Court of Appeals. The lower courts would be bound to follow the earlier decision. *United States v. United States District Court*, 334 U.S. 258 (1948); *Chicago and Northwestern Transportation Co. v. United States*, 574 F.2d 926 (7th Cir. 1978).

Immediate review may extinguish the need for further proceedings. *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977); *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976). It could also prevent the expenditure of state court resources by making unnecessary the enactment of supplemental rules. *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966). In these circumstances, the decision of the Court of Appeals is final and the policy underlying 28 U.S.C. § 1254(2) will be furthered by allowing this appeal.

B. The judicial alternative to parental notification satisfies the constitutional requirements announced in *Planned*

Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983), and *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), without supplementary state court rules. Existing rules of Illinois practice enable a minor to obtain prompt review of a decision denying her waiver petition. Further, the minor's anonymity is similarly guaranteed by the terms of § 5 itself and the availability of recognized procedures for filing actions by the use of a party's initials and for impounding records. In exacting more stringent requirements before this Act has ever taken effect, the Court of Appeals misapplied the teachings of *Ashcroft* and *Bellotti II*. Section 5 ensures the minor the protections those decisions contemplate.

C. Assuming *arguendo* that § 5 does not satisfy constitutional standards applicable to consent statutes, appellant urges this Court to decide that an alternative proceeding is not required when a state statute only requires parental notification. This Court left that question open in *H.L. v. Matheson*, 450 U.S. 398 (1981), and its other cases have not conclusively resolved it. The character of notice is substantially different from consent and calls for a different evaluation of the procedures that must accompany a parental notice statute to bring it within constitutional bounds.

ARGUMENT

I.

THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1254(2) BECAUSE THE COURT OF APPEALS' DECISION IS A FINAL AND CONCLUSIVE DETERMINATION OF THE FACIAL VALIDITY OF THE ILLINOIS PARENTAL NOTICE OF ABORTION ACT.

A. This Appeal Falls Squarely Within The Scope Of § 1254(2).

A grant of jurisdiction must be construed in accordance with the objective it was designed to serve. *Maine v. Taylor* ___ U.S. ___, 106 S.Ct. 2440, 2446 (1986); *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 318 (1985); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-76 & n.11 (1974). In enacting § 1254(2), Congress sought to ensure that a state statute would not be invalidated without review in this Court unless the parties acquiesced in the court of appeals' decision. *Maine v. Taylor*, 106 S.Ct. at 2446; *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976); *Calero-Toledo*, 416 U.S. at 675 n.11. Thus, federal court nullification of a state statute was viewed as so important a matter as to subject the decision to this Court's mandatory jurisdiction. *See Calero-Toledo*, 416 U.S. at 675 n.11 (discussing history of § 1254(2)); 66 Cong. Rec. 2752-57, 2918-25 (1925) (legislative debates prompting enactment of § 240(a) of the Act of February 13, 1925, 43 Stat. 939 (1925) the predecessor of § 1254(2)).

In this case, the Court of Appeals reviewed a final judgment of the District Court which struck down the Illinois Parental Notice of Abortion Act and permanently enjoined its enforcement. The Court of Appeals affirmed that decision in many respects. It invalidated the waiting period

in § 4(a) and the exception to that requirement in § 7(a). (J.S. App. 3-10; 763 F.2d at 1535-39)[1] By severing those provisions, it precluded any reexamination of them at a future date. (J.S. App. 21-23; 763 F.2d at 1545)

The Court of Appeals also ruled that § 5, standing alone or in combination with existing rules of appellate practice, did not meet constitutional standards for ensuring confidential proceedings and expeditious appellate review for waiver of notification under *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983) and *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*). (J.S. App. 14, 16, 19; 763 F.2d at 1541-42, 1544) Although the Court of Appeals elected to allow the Illinois Supreme Court an opportunity to adopt additional appellate rules before holding the entire Act unconstitutional, (J.S. App. 13-14, 19-20; 763 F.2d at 1540-41, 1544) the only way the Act can survive this pre-enforcement facial challenge is if the Illinois Court promulgates those rules.

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[1] Citations to the record and other relevant materials will follow the form used in appellant's principal briefs. The decisions of the District Court and the Court of Appeals are reproduced in the Appendix to the Jurisdictional Statement (hereinafter J.S. App. ___). Reference is made to the relevant page of that Appendix and to the reported decision.

References to appellant's opening brief appear as (Def. br. ___). References to appellees' brief are cited as (Plt. br. ___). Passages in the reply brief are referred to as (Reply br. ___).

Citations to the Jurisdictional Statement appear as (J.S. ___). Citations to that portion of the record which appear in the Joint Appendix are made as (J.A. ___). Other record citations identify the pleading or document and refer to the page on which the reference appears.

The Illinois Parental Notice of Abortion Act is reprinted in the Appendix to appellant's opening brief at App. 3-App. 9. Citations to the Act do not include the full citation to the Illinois Revised Statutes, but only the appropriate section number.

This case is precisely the kind that Congress intended this Court to review under § 1254(2). The decision not only interrupts the State's statutory scheme by subjecting the Act to a continuous injunction, but it also prevents the Act from ever operating as the State legislature intended. Regardless of the outcome of the proceedings on remand, the waiting period and § 7(a) have been eliminated.

Furthermore, the decision summons efforts by the State Supreme Court which are not constitutionally necessary. As appellant demonstrates in Part III of the Argument, the Act provides a framework for confidential and expeditious by-pass procedures even without supplementary state court rules. *See infra* pp. 22-28. In a related vein, whether those procedures are required at all, itself poses a constitutional question which the Court of Appeals resolved. *See infra* pp. 28-29.

Fundamentally, § 1254(2) represents an acknowledgment of the potential fissures which may result when a state program is supplanted by federal court action. *City of New Orleans v. Dukes*, 427 U.S. at 302; *Calero-Toledo*, 416 U.S. at 675 n.11. Where, as here, that action not only bars the program, but also necessitates additional expenditure of state court resources, the policy underlying § 1254(2) would be thwarted by delaying review. *See, e.g., Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989 (1987) (interpreting 28 U.S.C. § 1257); *City of New Orleans v. Dukes*, 427 U.S. at 302; *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966) (interpreting 28 U.S.C. § 1257). The character of the decision in this case merely buttresses that concern.

There is nothing tentative or conditional about the rulings of the Court of Appeals. They are a full and complete determination that the Illinois Act as written is incompatible with the Constitution. In these circumstances, if

the purpose of § 1254(2) is to be served, the decision must be considered final.

B. Since The Court Of Appeals Definitively Resolved All Of The Constitutional Questions Presented To It, The Decision Is A Final Appealable Judgment.

The character of a decision as final or interlocutory depends upon the substance of the proceedings below, not on the terms employed in it or the conditions attached to it. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 n.8 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971); *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 312 n.5 (1968). Fundamentally, "[t]he question is whether it can be said that 'there is nothing more to be decided' (*Clark v. Willard*, 292 U.S. 112, 118), that there has been 'an effective determination of the litigation.' *Market Street Ry. Co. v. Railroad Commission*, 324 U.S. 548, 551." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479 n.8.[2]

There can be no doubt that this decision readily satisfies that criteria. The remand order only contemplated further proceedings in the event the Illinois Supreme Court enacted additional rules. Since no such rules are in existence, proceedings on remand remain a mere contingency.

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[2] The principles which guide the finality determination are fully set forth in appellant's earlier briefs in this case. (Def. br. 18-34; Reply br. 1-11) It is no longer necessary to consider the judgment in separate components since this Court reintegrated the case in its order of April 7, 1987. Nonetheless, the arguments previously made are still relevant and the authority cited in support of them applicable. They are reincorporated here. The reunification of the case merely bolsters appellant's stance that the judgment is final within the meaning of 28 U.S.C. § 1254(2).

Yet, an injunction prevents the Act from operating and cannot be lifted by any action appellant might take.

With the case in this posture, the decision of the Court of Appeals is a definitive adjudication of the constitutional invalidity of the Act on its face. The injunction which prevents its enforcement is permanent. It was not intended as an interim measure to preserve the status quo until the merits of the controversy could be evaluated. *See University of Texas v. Camenisch*, 451 U.S. 390, 395-96 (1981) (distinguishing preliminary and permanent injunctions). Rather, it was imposed after the statute was fully reviewed in both of the lower courts.

In practical impact, it is no different from any permanent injunction which remains subject to a court's inherent power to modify or dissolve it upon a showing of changed circumstances. *System Federation No. 91, Railway Employees' Department v. Wright*, 364 U.S. 642, 646-47 (1961); *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 298-99 (1941). That authority, however, even when it is expressly reserved in the appealed order, does not impair the character of the decision as final. *St. Louis, I.M. & S. Railway Co. v. Southern Express Co.*, 108 U.S. 24, 29 (1883). Indeed, this Court has not been deterred from finding finality when, as here, the entry of an injunction effectively disposes of the claims presented for review, regardless of how the lower courts characterized it. *Organization for a Better Austin v. Keefe*, 402 U.S. at 418 n.1; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. at 312 n.5; *Local No. 438 Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963).

Moreover, in this case, appellant is powerless to take action to lift the injunction and hence to open an avenue for review in this Court. Under the Illinois Constitution,

its Supreme Court alone has authority to make rules for appellate practice. Ill. Const. of 1970, art. VI, § 16; *People v. Jackson*, 69 Ill. 2d 252, 256-59, 371 N.E.2d 602, 604-606 (1977). The Court is not a party to this proceeding and neither the legislature nor any constitutional officer can compel that Court to exercise its exclusive powers. *See People v. Cox*, 82 Ill. 2d 268, 275-76, 412 N.E.2d 541, 544-45 (1980); *People ex rel. Stamos v. Jones*, 40 Ill. 2d 62, 65-66, 237 N.E.2d 495, 497-98 (1968). Thus, this situation is not one in which the litigation could proceed if appellant chose to pursue it in the District Court. He is impeded from doing so by legal, not practical obstacles. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 10 n.11 (1983); *Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 216 (5th Cir. 1984).

What is more, any proceedings on remand which may occur will not affect the issues that have already been decided. The District Court is obliged to obey the mandate of the Court of Appeals. *United States v. United States District Court*, 334 U.S. 258, 263 (1948); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 669 F.2d 490, 493 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982); *see also* 1B J. Moore, J. Lucas & T. Currier, MOORE'S FEDERAL PRACTICE ¶ 0.404[10] (2d ed. 1984) [hereinafter 1B MOORE'S FEDERAL PRACTICE]. It is, therefore, precluded from reexamining the constitutionality of the waiting period and § 7(a).

Similarly, it may not modify, in any respect, the Court of Appeals' determination that § 5 fails to meet constitutional standards alone or in conjunction with existing state court rules. *Rutherford v. United States*, 806 F.2d 1455, 1460 (10th Cir. 1986); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied sub nom. Hoffman*

v. Sylva, ___ U.S. ___, 106 S.Ct. 2889 (1986). The Court of Appeals expressly decided those issues.

Nor is it likely that the Court of Appeals would alter its earlier rulings even if the case were to reach it a second time. The doctrine of law of the case poses formidable obstacles to a party seeking reconsideration of an issue previously decided in the litigation. *Goodpasture, Inc. v. M/V Pollux*, 688 F.2d 1003, 1005-1006 (5th Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983); 1B MOORE'S FEDERAL PRACTICE ¶¶ 0.404[1], 0.404[4-5]. In the circumstances presented here, those obstacles are magnified since, at least with respect to the waiting period and the need for by-pass procedures in this context, the Court of Appeals would not only be obliged to reconsider its first decision in this case, but also *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983). In addition, once supplementary rules are enacted, that Court may very well consider the question whether § 5 is unconstitutional without them to be moot. *See Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72-73 (1983).

In light of these factors the mere possibility of a future appeal is not an adequate justification for postponing review. In this situation, "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and delayed justice.' " *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *see also Pennsylvania v. Ritchie*, 107 S.Ct. at 997 n.7.

If this Court declines to hear the case at this juncture, appellant will be forced to return to the District Court to await the enactment of supplemental rules. If no rules are forthcoming, the case will pend and the Act will remain perpetually enjoined. This consequence is especially significant here because the Court of Appeals definitively invalidated some of the Act's provisions. That ruling could thus escape review and defeat the primary objective of § 1254(2). *Maine v. Taylor*, 106 S.Ct. at 2446; *City of New Orleans v. Dukes*, 427 U.S. at 302.

Alternatively, if the Illinois Supreme Court promulgates rules, appellant will be required to resurrect all of the issues previously laid to rest by the lower federal courts in order to preserve those questions for later review in this Court. A renewed presentation of these issues will be a mere formality. The District Court is not empowered to alter the decision, *United States v. United States District Court*, 334 U.S. at 263; *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[10], and the Court of Appeals will adhere to its earlier rulings. *Chicago and Northwestern Transportation Co. v. United States*, 574 F.2d 926, 929-31 (7th Cir. 1978). Consequently, at least with respect to the waiting period and § 7(a), the issues will survive future proceedings and return to this Court at a later date. Yet, the lower courts' rulings on those issues are preordained.

In similar situations, this Court has adhered to a flexible and pragmatic application of finality principles. In accordance with that practice, it has held the decision to be final even though further proceedings were anticipated. *See, e.g., Pennsylvania v. Ritchie*, 107 U.S. at 997 n.7; *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479-80; *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953).

The determination that § 5 requires additional rules to bring it in conformity with constitutional standards, in contrast, may escape review altogether. The enactment of supplemental rules by the State Supreme Court, a nonparty which is not subject to legislative controls in this area, may render moot the question whether the Act is

invalid without them. *Compare Iron Arrow Honor Society v. Heckler*, 464 U.S. at 72-73 *with City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982). In that event, an important constitutional question will evade this Court's review. This factor has often militated against a rigid construction of the finality rule. *Pennsylvania v. Ritchie*, 107 S.Ct. at 996-98 (1987); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 481-82; *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 162-63 (1973).

However, even if this question does not become moot, postponing review may result in an unnecessary expenditure of time and effort by the Illinois Supreme Court should this Court ultimately decide that supplemental rules were not constitutionally mandated. In addition, appellant will be forced to engage in proceedings on remand when no further litigation should have been required. *Shaffer v. Heitner*, 433 U.S. at 195 n.12; *City of New Orleans v. Dukes*, 427 U.S. at 302.

On the other hand, immediate review could eliminate entirely the need for a future appeal. This Court could reverse the Court of Appeals' decision, obviating the need for further lower court proceedings and conserving the time and efforts of the State Supreme Court. Even if the Court were to affirm, however, the prospect of another appeal in this forum remains speculative. The Illinois Supreme Court may fashion supplementary rules that withstand constitutional evaluation in the lower courts. In that event, review in this Court would be subject only to its discretionary jurisdiction. Section 1254(2) does not authorize an appeal where a state statute is upheld against a constitutional attack. 28 U.S.C. § 1254(2).

The Court has consistently applied the finality doctrine flexibly, bearing in mind the competing policies of "the

inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *see also Pennsylvania v. Ritchie*, 107 S.Ct. at 997 n.7; *Cox Broadcasting Co. v. Cohn*, 420 U.S. at 477-78; *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964). When, as here, all of the issues presented have been definitively resolved and the prospect of future litigation is at best contingent, the danger of denying justice far outweighs the competing concern of avoiding piecemeal review. *See, e.g., Organization for A Better Austin v. Keefe*, 402 U.S. 415; *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308. In this case, that danger is intensified because the decision of the Court of Appeals rendered a state statute inoperable. Accordingly, the judgment is final and this Court has jurisdiction to review it under § 1254(2).

II.

THE ILLINOIS ACT ESTABLISHES A CONSTITUTIONALLY ADEQUATE ALTERNATIVE FOR MINORS WHO SEEK TO AVOID PARENTAL NOTICE OF THEIR ABORTION DECISION.

This Court's decisions make clear that the State of Illinois has a significant interest in encouraging parental participation in the abortion decisions of its minor citizens. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427 n.10 (1983); *H.L. v. Matheson*, 450 U.S. 398, 409-10 (1981); *id.* at 419 (Powell, J., concurring); *id.* at 421-25 (Stevens, J., concurring in judgment); *Bellotti II*, 443 U.S. at 640-41 (plurality opinion); *id.* at 656-57 (White, J., dissenting). While it may promote that interest by requiring parental involvement, "the State may not impose a blanket provision . . . requiring the consent of

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a parent or person *in loco parentis* as a condition for abortion of an unmarried minor." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976); *City of Akron*, 462 U.S. at 439.

To guard the state's interest and yet protect the minor's right, a majority of the Court has recognized that a state may require parental consent if it also provides "an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *Ashcroft*, 462 U.S. at 491 (quoting *City of Akron*, 462 U.S. at 439-40) (plurality opinion of two Justices); *id.* at 505 (O'Connor, J., with two other Justices, concurring in the judgment in part and dissenting in part) (expressing opinion that consent statute is valid "because it imposes no undue burden on any right that a minor may have to undergo an abortion"); *see also Bellotti II*, 443 U.S. at 643-44 (plurality opinion of four Justices); *id.* at 656-57 (White, J., dissenting) (approving absolute parental or judicial consent).

On the other hand, with the exception of *Matheson*, the Court has not had occasion to treat the constitutionality of a state statute which merely requires notice to parents before their daughter obtains an abortion. In *Matheson*, the Court sustained a parental notice provision against a constitutional challenge as it applied to an immature, unemancipated minor who did not show that notification was contrary to her best interest. *Matheson*, 450 U.S. at 411-13. It expressly did not decide how such a requirement would fare when applied to mature and best-interest minors or "in what circumstances a state must provide alternatives to parental notification." *Id.* at 412 n.22; *see also id.* at 413 n.25.

Nevertheless, in *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F.2d 1127, the Seventh Circuit adopted the constitutional standards for consent statutes when ruling on the validity of a parental notice provision. *Id.* at 1131-32. It therefore exacted an alternative procedure by which a minor could seek to avoid parental notification. Further, the Court of Appeals ruled that the state was constitutionally bound to provide for appointment of counsel in order "to ensure that the waiver hearing becomes an effective opportunity for the minor to obtain an abortion upon a proper showing." *Id.* at 1138.

In compliance with the decisions of this Court and the Seventh Circuit's directives, the Illinois Act establishes procedures for waiving the parental notice requirement. Section 5 requires the court to waive parental notification if the minor demonstrates 1) that she is "mature and well-informed enough to make the abortion decision on her own" or 2) that notification would not be in her best interests. § 5(d).

The court is obliged to reach its decision within forty-eight hours from the time the waiver application is made. § 5(c). Its decision must contain "written and specific factual findings and legal conclusions." § 5(e). The proceedings "shall be confidential and shall ensure the anonymity of the minor." § 5(c). Further, the court must "order that a confidential record of the evidence be maintained." § 5(e).

In order to assist the minor in these proceedings, a guardian ad litem must be appointed. The court must tell the minor that she is entitled to the appointment of counsel, and counsel must be appointed upon her request. § 5(b). She need not pay filing fees. § 5(h).

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The Act guarantees "[a]n expedited confidential appeal . . . as the Supreme Court provides by rule" for any minor whose waiver application is denied. § 5(f). In addition, because the General Assembly is not empowered to prescribe rules of appellate practice in Illinois, Ill. Const. of 1970, art. VI, § 16; *People v. Cox*, 82 Ill. 2d at 275-76, 412 N.E.2d at 544-45, "[t]he Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner." § 5(g).

In passing on the Act's judicial alternative, the Court of Appeals held that it did not adequately ensure that appellate review would be conducted expeditiously or that the minor's anonymity would be protected. (J.S. App. 14, 16, 19; 763 F.2d at 1541-42, 1543-44) However, relying upon *Ashcroft*, *Pearson*, and the Third Circuit's decision in *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984), *aff'd*, ____ U.S. ____, 106 S.Ct. 2169 (1986), the majority abstained from invalidating the statute entirely to allow the Illinois Supreme Court an opportunity to promulgate additional rules. (J.S. App. 13-14, 20; 763 F.2d at 1540-41, 1544) It enjoined the Act until constitutionally sufficient rules were enacted.

This decision is erroneous. The Court of Appeals exacted a degree of specificity not contemplated by this Court's decision in *Ashcroft* and *Bellotti II*. In so doing, it failed to heed this Court's frequent admonitions that state courts must be presumed to act consistently with constitutional pronouncements. *See Ashcroft*, 462 U.S. at 491 n.16; *Matheson*, 450 U.S. at 406-407; *Bellotti II*, 443 U.S. at 465 n.25; *Bellotti v. Baird*, 428 U.S. 132, 146-48 (1976) (*Bellotti I*). As a result of these mistaken premises, the Court of Appeals prevented the Act from operating even

though, as it acknowledged, existing Supreme Court rules "unquestionably give a minor seeking an abortion the opportunity to have an expeditious hearing" on appeal and even though the Act mandates confidential judicial proceedings. (J.S. App. 16; 763 F.2d at 1542)

A. The Court Of Appeals Measured The Judicial Alternative Against A Standard Inconsistent With This Court's Decisions In *Bellotti II* And *Ashcroft*.

In holding that the absence of explicit state court rules of appellate procedure was a "fundamental defect in Section 5," (J.S. App. 14; 763 F.2d 1541) the Court of Appeals largely relied upon the Third Circuit's decision in *Thornburgh*. (J.S. App. 13-14, 19; 763 F.2d at 1540-41, 1543; *see also* J.S. App. 51; 763 F.2d at 1559 (Coffey, J., dissenting)) In so doing, it apparently was influenced by the standard the Third Circuit employed to judge the adequacy of a state by-pass procedure. In *Thornburgh*, that court stated: "To pass constitutional muster, the alternative judicial procedure must be an established and practical avenue and may not rely on generally stated principles of availability, confidentiality, and form." *Thornburgh*, 737 F.2d at 297.[3] This standard is at odds with the letter and the spirit of this Court's decisions.

In *Bellotti II*, the plurality opinion articulated the requirements for a constitutionally adequate alternative procedure. "The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportuni-

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[4] In fact, there is some question whether a state is constitutionally required to supply full appellate review in this context. Both *Bellotti II* and *Ashcroft* made reference to the possibility that the requisite independent decisionmaker could be a non-judicial officer. *Bellotti II*, 443 U.S. at 643 n.22; *Ashcroft*, 462 U.S. at 492 n.20. If a state is permitted to choose that route, there would be considerable doubt about the availability of obtaining review of an adverse decision.

Furthermore, it must be borne in mind that the adverse consequences of an incorrect decision in this context are not as severe as when the state requires parental consent. *See infra* pp. 32-33. Although parents would have to be notified, the minor would be free to execute her decision. Thus, this distinction could very well warrant somewhat more flexible procedures for by-passing parental involvement when the form it takes is only notification. *Cf. Ake v. Oklahoma*, 470 U.S. 68 (1985) (taking into account private and public interests and risk of erroneous deprivation in setting procedural due process requirements); *Santosky v. Kramer*, 455 U.S. 745 (1982) (same).

[5] The Massachusetts statute at issue in *Bellotti II* was amended and the superior court issued an order applicable to trial court proceedings for waiver-of-consent cases. Neither the statute nor the order provided for appeals. The First Circuit, nevertheless, upheld the amended statute. Although it "attach[ed] some significance to the manner in which an appeal is taken," it relied on the state's representation that an appeal was available when a minor's petition was denied. *Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1011 n.8 (1st Cir. 1981).

In *Ashcroft*, a similar approach was taken.[6] The statute met *Bellotti II*'s requirements because it "provide[d] the framework for a constitutionally sufficient means of expediting judicial proceedings." *Ashcroft*, 462 U.S. at 491 n.16. It also ensured confidentiality by allowing the minor to use her initials on her waiver petition. *Id.* Although the statute directed the state supreme court to make rules governing appeals, this Court was not apprised that the state court had complied with that directive.[7] Nonetheless, it could be presumed that the state "would expedite any appeal consistent with the mandate in [the Court's] prior opinions." *Id.*

Ashcroft did not impose the stringent requirements for alternative proceedings which the Court of Appeals demanded in this case. For example, although the minor was permitted to use her initials on the petition for waiver, the information it contained could readily have revealed her identity. She was required to supply the names and addresses of each parent or parent substitute. She had to give her age and sign the petitions. Further, the hearing was to be transcribed and presumably a written order issued. *Ashcroft*, 462 U.S. at 479 n.4 (citing Mo. Rev. Stat.

[6] The relevant portion of the opinion expressed the views of two Justices. *Ashcroft*, 462 U.S. at 491 n.16 (Powell, J., joined by Burger, C.J.). However, three Justices concurred in upholding the statute on broader grounds. *Id.* at 505 (O'Connor, J., concurring in the judgment in part and dissenting in part).

[7] In *T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986), the plaintiffs again challenged the Missouri statute on its face for failure of the state supreme court to enact detailed rules for appellate review. The Court of Appeals pointed out that a rule had been in effect when this Court decided *Ashcroft*. It provided simply: "Appellate review of cases appealed under section 188.028.2(6), RSMo. shall be expedited." 792 F.2d at 736. The Court of Appeals dismissed the facial challenge on the ground of this Court's decision. *Id.* at 738.

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[7] In *T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986), the plaintiffs again challenged the Missouri statute on its face for failure of the state supreme court to enact detailed rules for appellate review. The Court of Appeals pointed out that a rule had been in effect when this Court decided *Ashcroft*. It provided simply: "Appellate review of cases appealed under section 188.028.2(6), RSMo. shall be expedited." 792 F.2d at 736. The Court of Appeals dismissed the facial challenge on the ground of this Court's decision. *Id.* at 738.

§ 188.028 (Supp. 1982)). Neither the statute nor court rule however, detailed procedures for systematically processing the petition or preserving the file in a confidential manner.

Similarly, although the statute in *Ashcroft* provided some time limitations for perfecting the appeal, it did not specify a period in which the decision had to be made. It merely required the minor to file her notice of appeal within twenty-four hours, a course which she or her counsel would probably have followed in any event, and it set a time for compiling the record. Despite this omission, this Court presumed the state appellate courts would fulfill their obligation to comply with constitutional mandates.

The flexibility with which this Court has applied the general criterion of providing an expeditious and confidential alternative procedure stands in stark contrast to the rigid particularization which the Court of Appeals required the Illinois Act to meet. Had it followed *Bellotti II* and *Ashcroft*, it would have lifted the injunction and allowed the Act to operate.

B. The Act Provides A Constitutionally Adequate Framework For Expeditious Appeals And Confidential Court Proceedings.

The Illinois Act, like the statute in *Bellotti II* and *Ashcroft*, was enjoined before it went into effect. As in those cases, there is no evidence that Illinois courts will not fulfill their obligation to carry out the judicial proceedings established in § 5 in compliance with the dictates of those decisions. *Ashcroft*, 462 U.S. at 491 n.16; *Bellotti II*, 443 U.S. at 645 n.25. In fact, as appellees conceded in the Court of Appeals, § 5 itself ensures expeditious procedures at the hearing stage. (J.S. App. 11; 763 F.2d at 1539) As in *Ashcroft*, there is no reason to believe that

the Act's provisions will be disregarded at trial or on appeal.

In the context of a pre-enforcement facial challenge, *Ashcroft* and *Bellotti II* teach that a state statute should not be enjoined so long as it "provides the framework for a constitutionally sufficient means of expediting judicial proceedings" and of preserving the minor's anonymity. *Ashcroft*, 462 U.S. at 491 n.16; *see also Bellotti II*, 443 U.S. at 456 & n.25. This statute meets that requirement.

1. Expeditious Appellate Proceedings Are Ensured.

Section 5(c) compels the circuit court to reach a decision within forty-eight hours of the filing of the petition. § 5(c). A minor whose petition is denied may file her notice of appeal immediately. The circuit court must transmit that document to the appellate court within five days. Ill. Sup. Ct. R. 303(a)(4) (Ill. Rev. Stat. ch. 110A, ¶ 303(a)(4) (1985)). Once the appellate court receives the notice of appeal, the case is placed on the docket. Ill. Sup. Ct. R. 303(f) (Ill. Rev. Stat. ch. 110A, ¶ 303(f) (1985)).

Immediately after her petition is denied, the minor, with the assistance of her guardian ad litem and court-appointed counsel, may begin preparations to expedite the appeal. Under Supreme Court Rule 311, the parties—in this case the minor—may substitute a statement of facts and a memorandum instead of a formal record and brief. Ill. Sup. Ct. R. 311 (Ill. Rev. Stat. ch. 110A, ¶ 311 (1985)). She may request an accelerated schedule as soon as the case is docketed.[8] The flexible procedures for preparing

[8] Rule 311 permits the request for acceleration to be made after the docketing statement is filed. This may be done promptly after the minor files her notice of appeal. Ill. Sup. Ct. R. 303(g) (Ill. Rev. Stat. ch. 110A, ¶ 303(g) (1985)).

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the case for submission permit the appeal to be perfected contemporaneously or shortly after docketing. The appellate court may then enter an expedited schedule for disposition.

The Court of Appeals' reading of this avenue of appeal as discretionary overlooks the fact that, in this context, the Illinois Appellate Court must conduct appellate proceedings in accordance with constitutional standards. In other contexts, the Illinois courts have carefully followed this Court's directives. *See, e.g., Chicago Housing Authority v. Stewart*, 43 Ill. 2d 96, 251 N.E.2d 185 (1969), *cert. denied*, 397 U.S. 1000 (1970); *Wanless v. Rothballer*, 136 Ill. App. 3d 321, 483 N.E.2d 899 (1985), *aff'd*, 115 Ill. 2d 158, 503 N.E.2d 136 (1986). It cannot be presumed that they will deviate from their constitutional obligation to dispose of this class of appeals with dispatch.

Moreover, the Court of Appeals did not correctly evaluate the expedited procedures available in Illinois when it compared them to the statute involved in *Ashcroft*. It noted that, unlike the Missouri statute, the Illinois Act did not contain specified time periods for filing the notice of appeal and perfecting the record. (J.S. App. 12; 763 F.2d at 1540) However, existing procedures in Illinois provide the minor with comparable assurances that her appeal will be completed.

The Missouri statute required the minor to give notice of her intent to appeal within twenty-four hours of the date on which the petition is denied. An Illinois minor has the same advantage: she may file a notice of appeal immediately after the lower court disposes of the petition.

Further, by invoking Rule 311, she can ensure that her appeal is ready for disposition as soon as the court enters an order setting the expedited schedule. Since she may request an expedited schedule as soon as the case

is docketed—a procedure that must be completed within five days—her appeal could be perfected within the same time as the limitations set by the Missouri statute in *Ashcroft*.[9] These procedures are certainly more explicit than the pronouncements of the Massachusetts high court in *Bellotti II*, which were said to "avoid much of what was objectionable in the statute challenged in *Danforth*." *Bellotti II*, 443 U.S. at 645.

As the Court of Appeals recognized, should the need for more specific rules arise, the Illinois Supreme Court is requested to promulgate them. § 5(g). As in *Ashcroft* and *Bellotti II*, the continued restraint upon the Act's enforcement and the existence of ongoing federal litigation have obviated that necessity. (Def. br. 28-29) Nonetheless, the Act, in conjunction with Supreme Court Rules 303 and 311, offers an effective opportunity for obtaining appellate review with sufficient speed so as to enable the minor to effectuate her decision without parental notice.[10]

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[9] In this regard, it is significant that the Missouri Juvenile Court had five days from the filing of the petition to enter its order. *Ashcroft*, 462 U.S. at 479 n.4 (citing Mo. Rev. Stat. § 188.028 (Supp. 1982)). In Illinois, only forty-eight hours may pass between the filing of the petition and disposition in the trial court. § 5(c).

[10] If there remains any doubt that the appellate courts will expedite appeals under Supreme Court Rules 303 and 311, this Court should certify that question to the Illinois Supreme Court for an authorative interpretation.

Illinois Supreme Court Rule 20 permits this Court and the Court of Appeals to certify questions of state law to the Illinois Supreme Court. Ill. Sup. Ct. R. 20 (Ill. Rev. Stat. ch. 110A, ¶ 20 (1985)). Although the Court of Appeals refused to invoke this procedure despite appellant's request, (Brief and Argument for Defendant-Appellant Hartigan, 34-35; Reply Brief for Defendant-Appellant Hartigan, 26) this Court has approved of the practice "where an unconstrued state statute is susceptible of a construction by the

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2. The Minor's Anonymity Will Be Preserved.

The Act provides that "[c]ourt proceedings under this Section shall be confidential and shall ensure the anonymity of the minor or incompetent." § 5(c). It requires the circuit court to order "that a confidential record of the evidence be maintained," § 5(e), and it establishes the availability of a "confidential appeal." § 5(f). It invites the Illinois Supreme Court to enact "any rules and regulations necessary to ensure that proceedings . . . are handled in a confidential manner." § 5(g).

The Court of Appeals found that these provisions, without additional specific rules, could not ensure the minor's anonymity in the course of court proceedings or after their completion. (J.S. App. 19; 763 F.2d at 1543) Although it reviewed this Court's decisions in *Ashcroft* and *Bellotti II*, it placed principal reliance upon the Third Circuit's interpretation of them in *Thornburgh*, 737 F.2d at 297, and, like that court, enjoined the statute until supplementary rules were promulgated. (J.S. App. 20; 763 F.2d at 1544) This decision, like the determination of the Act's provision for expedited appellate proceedings, was inattentive to this Court's teachings.

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Court perceived no constitutional flaw on the face of the statute. *Id.* (plurality opinion of Powell, J.); *id.* at 505 (O'Connor, J., concurring in judgment in part and dissenting in part).

Similarly, in *Bellotti II*, the Court was satisfied with the assurances of the Massachusetts court that the minor was not required to use her name in a waiver-of-consent proceeding and that "steps may be taken, by impoundment or otherwise, to preserve confidentiality." *Bellotti II*, 443 U.S. at 645 (quoting *Baird v. Attorney General*, 371 Mass. 741, 757-58, 360 N.E.2d 288, 298 (1977)). Like Missouri, then, Massachusetts was not required to particularize safeguards, at least when no showing had been made that such safeguards were necessary to bring the application of the statute in compliance with constitutional standards.

Although the Illinois Act does not expressly direct the minor to use her initials or a pseudonym in applying for waiver, she is free to do so. It is customary in Illinois for parties to pursue their actions by using their initials when the subject of the lawsuit pertains to sensitive or private matters. *See, e.g., I.F. v. Department of Children and Family Services*, 146 Ill. App. 3d 68, 496 N.E.2d 1162 (1986) (expungement of report of child abuse); *JFS v. ABMJ*, 120 Ill. App. 3d 261, 458 N.E.2d 76 (1983) (alienation of affections). Certainly, in these cases, in which anonymity is constitutionally mandated, the minor will not be prevented from following a similar course.

In addition, the Act requires the court to order that "a confidential record of the evidence be maintained." § 5(e). This directive, together with the well-established inherent authority of Illinois courts to impound records, ensures that the files in these cases will not be made

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In addition, the Act requires the court to order that "a confidential record of the evidence be maintained." § 5(e). This directive, together with the well-established inherent authority of Illinois courts to impound records, ensures that the files in these cases will not be made

public. Indeed, in Illinois, the court's authority has been held to supersede a statutorily created right of access to court files. *JFS v. ABMJ*, 120 Ill. App. 3d at 263, 458 N.E.2d at 78-79; *Deere & Co. v. Finley*, 103 Ill. App. 3d 774, 776, 431 N.E.2d 1201, 1203 (1981). When a statute prohibits the disclosure of records, as this one does, the Illinois Supreme Court has stringently adhered to its terms. *In re Roger B.*, 84 Ill. 2d 323, 418 N.E.2d 751, *appeal dismissed for want of a substantial federal question sub nom. Barth v. Finley*, 454 U.S. 806 (1981) (refusal to permit adult to examine his adoption records).

Accordingly, the Illinois Act supplies the necessary assurances that the minor's privacy will be protected if she decides to pursue the alternative procedure. In this regard, it is important to consider that she need not undertake this alternative alone. She will be accompanied by her guardian ad litem and, if she desires, court-appointed counsel. In these circumstances, the Illinois Act plainly provides the framework for a constitutional alternative to notification.

III.

ASSUMING *ARGUENDO* THAT THE ACT'S ALTERNATIVE PROCEDURE DOES NOT MEET CONSTITUTIONAL STANDARDS APPLICABLE TO PARENTAL CONSENT STATUTES, THIS COURT SHOULD ADDRESS THE QUESTION LEFT UNRESOLVED IN *MATHESON* AND HOLD THAT THE STATE IS NOT OBLIGED TO PROVIDE AN ALTERNATIVE TO PARENTAL NOTIFICATION.

Despite the absence of an explicit pronouncement of this Court, the Court of Appeals equated parental notice and consent and held that an alternative procedure was constitutionally required even though the state did not sanc-

tion a parental veto of a minor's abortion decision. (J.S. App. 11; 763 F.2d at 1539) In reaching this conclusion, the Court relied on *Bellotti II* and its earlier decision in *Pearson*. This holding misinterprets this Court's opinions and fails to take into account the fundamentally different character of notification and consent.

A. This Court Has Not Decided Whether Alternative Procedures Are Required When A State Statute Prescribes Parental Notification.

Bellotti II did not dispose of the question whether a state may require parental notification of a minor's abortion decision without establishing a procedure through which the minor may exempt herself from that requirement. The plurality found fault with a Massachusetts statute which, as construed, would have required parents to be notified of court proceedings in which the minor sought to waive parental consent to her abortion whenever her parents were available. *Bellotti II*, 443 U.S. at 646-47, 651. As the four concurring Justices pointed out, however, that statute was distinct from one "which does nothing more than require notice to the parents without affording them or any other third party an absolute veto." *Id.* at 654 n.1. In their view, the plurality opinion did not decide the constitutionality of such a provision. *Id.* Moreover, the concurring Justices rested their opinion squarely on *Danforth* and found the consent requirement unconstitutional because it imposed an "absolute third-party veto" upon the minor's decision. *Id.* at 654 (Stevens, J., concurring in judgment).

If *Bellotti II* had ended the constitutional inquiry in this context, the Court's limited holding in *Matheson* and the concurring opinions in that case would make little sense. The Court faulted the dissent because it "purports to see

in the Court's opinion 'a clear signal' as to how the Court will decide a future case concerning this or a similar statute." *Matheson*, 450 U.S. at 413 n.25. This reproach would have been quite unnecessary had the Court put the matter to rest in *Bellotti II*. The concurring Justices explicitly acknowledged that the question remained open and expressed markedly diverse views about whether an alternative procedure must accompany a notice requirement as a constitutional matter. *Compare Matheson*, 450 U.S. at 418-20 (Powell, J., concurring) *with id.* at 420-25 (Stevens, J., concurring in judgment).

Although the Court spoke in broad terms in *City of Akron*, referring to constitutional principles which govern "parental involvement" in a minor's decision to have an abortion, *City of Akron*, 462 U.S. at 427 n.10, the sole question presented in that case was whether the city could require a minor to obtain her parents' consent when it failed to outline an alternative procedure. The Court viewed this question as settled. *Id.* at 439-40. Therefore, there was no need to pass upon a notice provision and the reference does not constitute binding precedent.[11] *McDaniel v. Sanchez*, 452 U.S. 130, 141-42 (1981); *Kastigar v. United States*, 406 U.S. 441, 454-55 (1972). Indeed, this Court has resisted deciding complex questions by relying on dicta in previous decisions. *See, e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968).

[11] Earlier in the opinion, the Court recognized that *Matheson* had not decided whether a "parental notice statute would be constitutional as applied to mature minors." *City of Akron*, 462 U.S. at 440. It also observed that the parental notification requirement contained in the ordinance, which had been upheld in the Court of Appeals, was not presented for review. *Id.* at 439 n.29.

Similarly, the Court's observation that juvenile court procedures would contravene the constitutional rights of mature minors by requiring notice in all cases was also unnecessary to the decision. *City of Akron*, 462 U.S. at 441 n.31. That observation was made in response to the city's contentions that the Ohio Juvenile Court could take jurisdiction of these cases and that this Court should presume that they would provide constitutionally adequate procedures. The Court rejected those contentions because it was not clear that the juvenile courts were even empowered to entertain these cases. It also found that the presumption that state courts would apply a state statute constitutionally did not operate when a city ordinance was involved. Thus, the decision in *City of Akron* was based on grounds which did not depend upon an interpretation of procedures followed in juvenile court.

The Court of Appeals presumed too much when it interpreted these decisions to set constitutional standards when mere notice is mandated. Conversely, it gave inadequate consideration to the distinction between parental notice and consent.

B. The State Of Illinois Is Not Constitutionally Required To Establish A Procedure For Waiving Parental Notification.

In an effort to bring its statute safely within constitutional bounds, the Illinois legislature created procedures for waiving the notification requirement. § 5. In doing so, it followed the guidelines established by the plurality opinions in *Bellotti II* and *Ashcroft*, which examined more restrictive consent provisions. In addition, it adhered to *Pearson* and tailored the Act to the Seventh Circuit's interpretation of the decisions of this Court. These efforts, however, should not foreclose examination of the pivotal

question which the Court of Appeals resolved first in *Pearson* and again in this case. The difference between consent and notice is sufficiently profound to warrant full examination of the constitutional requirements that apply in each context.

The Illinois Act "gives neither parents nor judges a veto power over a minor's abortion decision." *Matheson*, 450 U.S. at 411 (footnote omitted); *see also Bellotti II*, 443 U.S. at 654 & n.1 (Stevens, J., concurring in judgment). It permits the minor to effectuate her choice with the help and advise of her parents, but does not allow them to displant her wishes with theirs. Her constitutional right to decide for herself whether or not to bear a child remains intact and cannot be usurped by a third party. She remains free to execute her decision after the notice requirements are satisfied, regardless of her parents' wishes.

In contrast, when parents must give their consent to an abortion, they can undermine their daughter's right to decide. Because the right is irretrievably lost if the decision is postponed, *Bellotti II*, 443 U.S. at 642-43; *City of Akron*, 462 U.S. at 439-40, their veto has consequences for the minor which are far more severe than if they are merely apprised of her choice. Her parents, supported by the force of law, can compel her to bear a child. Thus, in this context, the distinction between notification and consent amounts to the difference between prompting guidance and coercing a result.

That distinction justifies the application of different constitutional standards. In either situation, the interest of the state remains constant. It seeks to ensure that the minor's decision is made wisely and that the parents' role in directing the upbringing of their children is preserved. The minor's interest, however, is fundamentally different. When she is obliged to obtain her parents' consent, unless

she has access to an independent arbiter, her choice—one that may have profound consequences for her future—can be negated. No such nullification is authorized in the case of a notice requirement. Thus, while her parents' objections may be strident, they are not ratified by statute.

In other contexts, this Court has considered competing individual and private interests in determining the need for procedural measures to ensure that important rights are not lost through erroneous decisions. *See, e.g., Ake v. Oklahoma*, 470 U.S. at 77; *Schall v. Martin*, 467 U.S. 253, 263-65 (1984); *Santosky v. Kramer*, 455 U.S. at 754; *Addington v. Texas*, 441 U.S. 418, 425-27 (1979). In this context, these same principles dictate that the access to an independent decisionmaker, required when parental consent is a statutory condition for a minor's abortion, is not constitutionally mandated when mere notice is prescribed.

Accordingly, even if the Illinois legislature provided an avenue for a minor to exempt herself from notifying her parents, those procedures were not required under the Constitution. The Act should thus be free to operate without regard to procedural requirements outlined in *Ashcroft*, *City of Akron*, and *Bellotti II*.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in appellant's earlier briefs, this Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. § 1254(2). Appellant requests this Court to reverse the judgment

holding unconstitutional the waiting period and § 7(a), to dissolve the injunction and to uphold the Illinois Parental Notice of Abortion Act in its entirety.

Respectfully submitted,

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APPENDIX

TUESDAY, APRIL 7, 1986
ORDER IN PENDING CASE

85-673 HARTIGAN, ATTY. GEN. V. ZBARAZ, DAVID, ET AL.

The parties are directed to file supplemental briefs addressing the merits of the second question presented in appellants' jurisdictional statement, as well as the question whether the Court of Appeals' decision is sufficiently final to permit this Court to take jurisdiction over the case under 28 U.S.C. §1254(2) to review both questions presented. Rule 35 of the rules of this Court prescribes the time for filing these supplemental briefs.

SUPPLEMENTAL

BRIEF

No. 85-673

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

NEIL F. HARTIGAN,

Appellants,

v.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether defendant erroneously asks this Court to invoke its mandatory jurisdiction under 28 U.S.C. § 1254(2) or its discretionary jurisdiction under § 1254(1), by seeking premature, advisory review of a statute, the constitutionality of which the court of appeals did not completely or finally adjudicate.

2. Whether the judicial alternative to compelled parental notice, which does not assure an expedited or anonymous appeal, fails to comply with the strict standards set forth by this Court in its prior decisions.

3. Whether application of the constitutional fact doctrine refutes defendant's claim, raised for the first time before this Court, that compelled parental notice is always in a minor's best interests, and whether new facts refute the further presumption that compelled parental involvement, even with a bypass alternative, advances legitimate state interests.

PARTIES

The defendants below, Neil F. Hartigan, in his official capacity as Attorney General of the State of Illinois, his agents and successors, and Richard M. Daley, in his official capacity as State's Attorney for Cook County, Illinois, his agents and successors, and as representative of all Illinois State's Attorneys, are appellants herein. Only defendant Hartigan has filed briefs. The plaintiffs below, and the appellees herein, David Zbaraz, M.D., and Allan G. Charles, M.D., brought this suit on behalf of a class of physicians similarly situated and on behalf of their minor patients.

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JURISDICTION

Defendant attempts to invoke this Court's obligatory jurisdiction pursuant to 28 U.S.C. § 1254(2). He seeks review of the Seventh Circuit's decision which vacated the district court's judgment that the Illinois Parental Notice of Abortion Act (the "Act"), Ill. Rev. Stat. ch. 38, ¶ 81-61 *et seq.* (1985), was unconstitutional, and then remanded the case for further proceedings on the constitutionality of the Act.

On October 14, 1986, this Court directed the parties to brief the first of the two issues presented by defendant's jurisdictional statement: whether a state can impose a mandatory waiting period upon a minor seeking an abortion. The Court also ordered the parties to brief the issue of whether jurisdiction appropriately could be exercised over only one portion of the case. (Order of October 14, 1986.) After briefing on these issues was complete, and after oral argument had been scheduled and then deferred, this Court directed the parties to file supplemental briefs on the remaining issue raised by defendant in his jurisdictional statement: whether the Illinois Act "provides a constitutionally sufficient framework for ensuring confidential and expedited appeals"; and, whether the court of appeals' decision is appropriate for review. (Order of April 7, 1987).[1]

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[1] Defendant-appellant Hartigan's (hereafter "defendant" or "Hartigan") initial brief is referred to as "Def. Br."; plaintiffs' initial brief is referred to as "Pl. Br." Citations to defendant's second brief appear as "Def. Supp. Br."; citations to his Jurisdictional Statement appear as "Juris. St." Finally, references to the defendant's appendix to the Jurisdictional Statement are listed as "App.," and references to the joint appendix filed by plaintiffs and defendant are listed as "J. App."

The Act is reprinted in Appendix A to plaintiffs' initial brief. Citations to the Act do not include the full statutory reference, but only the appropriate section number.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited in the initial Brief of Appellee at page 1, the rules discussed by appellant at page 2 of his supplemental brief also are relevant.

STATEMENT OF THE CASE

As set forth in plaintiffs' initial brief, the Illinois Parental Notice of Abortion Act creates an exception to Illinois law, which normally permits a pregnant minor to seek all medical care without parental involvement. *See* Ill. Rev. Stat. ch. 111, ¶ 4501 (1985). Under the Act, however, notice must be provided to both parents of a young woman seeking an abortion, or the young woman must obtain judicial waiver of the notice requirements. In the district court, plaintiffs established without contradiction the burdens imposed upon a young woman who is forced to have her parents advised about her unwanted pregnancy and her desire to terminate it. Many young women are afraid to consult with their parents about their pregnancy. They fear that their parents may evict them from the home or subject them to physical abuse. (J. App. 7, 10.) Under the Illinois Act, even young women who voluntarily inform one parent are not free from the restrictions. The Act compels notice to both parents in almost every circumstance. The mothers of the young women who would be subject to the Act's requirements have confirmed their daughter's apprehension of compelled notice to the father, confiding that "they [themselves] fear their husband will blame them for their daughter's dilemma, and will subject them to abuse." (J. App. 10.)

Plaintiff-physicians also established, again without contradiction by defendant, that the operative effect of the notice requirement would destroy the privacy and trust essential to the physician-patient relationship. (J. App. 5, 7.) Given these concerns and the potential for abuse, coupled with the medical risks inherent in delaying the

abortion procedure, plaintiff-physicians concluded that a mandatory parental notice of both parents is contrary to the best medical interests of their patients. (J. App. 5, 7.)

The focal point of plaintiffs' supplemental brief is the statute's judicial alternative to compelled parental notice: that it is incomplete and that it fails to provide a constitutional alternative to parental notice. Section 5(c) of the Act establishes a rudimentary system through which a young woman may petition a circuit court of Illinois for waiver of the parental notification requirements. Sections 5(f) and (g) of the Act provide for an appeal from an adverse circuit court judgment and request specific rules setting forth explicit nondiscretionary procedures for such an appeal. The Illinois Supreme Court, however, had not responded to the legislative request at the time of the Seventh Circuit's decision. Indeed, it has yet to respond. Given the incompleteness of the Act without these rules, the Seventh Circuit could not consider whether the bypass procedures in section 5 effectively served the intended purpose of preserving a minor's constitutional rights of privacy and preventing a third party from exercising an arbitrary veto over the young woman's decision to have an abortion. The Seventh Circuit thus concluded that "the constitutionality of the judicial alternative provided for under Section 5 should not be determined until the Illinois Supreme Court has had an opportunity to promulgate rules governing appeals." *Zbaraz v. Hartigan*, 763 F.2d 1532, 1541 (7th Cir. 1985), App. at 14.

Given the absence of contemplated and requested rules, the court of appeals found that the district court erred by deciding the facial constitutionality of the statute as a whole. It therefore vacated that part of the district court's decision which declared the Act, including section 5, unconstitutional. The need to protect the constitutional rights of minors, nonetheless, dictated continuing the injunction until rules were promulgated and a further

hearing held to determine the Act's validity. The court of appeals then remanded the case to the district court for further proceedings. *Id.* at 1545, App. at 23.

It is from this interlocutory decision, which appropriately refrained from determining the constitutionality of the incomplete Act, that the defendant now appeals.

SUMMARY OF THE ARGUMENT

1. This case is not in an appropriate posture for the exercise of the Supreme Court's mandatory jurisdiction under 28 U.S.C. § 1254(2). The court of appeals' decision is not a final judgment declaring a state statute "to be invalid as repugnant to the Constitution." 28 U.S.C. § 1254(2); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). The Seventh Circuit remanded the case for further proceedings below, which will occur whenever the Illinois Supreme Court promulgates the appellate rules contemplated and requested by the General Assembly. In remanding, the Seventh Circuit reserved the ultimate issue of the Act's constitutionality and enforceability.

Hartigan now asks this Court to evaluate the Illinois statute without these procedural rules, and to issue an advisory ruling on whether any judicial bypass is needed when a statute requires parental notice rather than consent. With these requests, Hartigan ignores the express intent of the Illinois legislature and seeks to invoke § 1254 jurisdiction for a purpose never intended and never before allowed – the tendering of advice on the constitutionality of a hypothetical procedure that is not before the Court for review. Such an expansive use of this Court's jurisdiction would exceed the scope of § 1254, and would result in this Court's review of a plethora of interlocutory lower court decisions. The absence of record evidence examining the impact of the incomplete and inoperative judicial bypass further emphasizes that the use of this case to determine important constitutional principles is inappropriate.

2. The Act in its current incomplete form does not satisfy existing constitutional requirements. If a statute mandating parental involvement in a young woman's abortion decision is to survive constitutional scrutiny, it "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." *City of Akron v. Akron Center For Reproductive Health, Inc.*, 462 U.S. 416, 439-440 (1983). Since *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*), this Court has required that any judicial alternative to parental involvement "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.* at 644.

Without the procedural rules contemplated and requested by the General Assembly, the Illinois Act is devoid of the protections which this Court has demanded in prior parental involvement cases. The Act, in its present form, neither establishes a procedure for a quick appeal nor takes any measure to protect the young woman's anonymity. *Compare Bellotti II*, 443 U.S. at 644; *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283, 297 (3d Cir. 1984), *aff'd on other grounds*, ___U.S.___, 106 S. Ct. 2169 (1986).

3. Hartigan inappropriately asks for a reexamination of prior decisions in which the Court established, as a matter of constitutional fact, that it is not always in a young woman's best interests for the state to compel parental involvement in her abortion decision. Hartigan offers no factual support for his argument to the contrary. Moreover, new adjudicatory and empirical findings confirm the harms, previously recognized by this Court, which will result from compelled parental involvement in every case. *See* National Research Council, RISKING THE FUTURE:

ADOLESCENT SEXUALITY, PREGNANCY AND CHILDBEARING (National Academy Press 1987); *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *cert. denied*, ___U.S.___, 107 S. Ct. 1333, *appeal argued but not decided*, Nos. 86-5423, 86-5431 (8th Cir. 1987). This new data further demonstrates that a bypass procedure is not a meaningful alternative for many young women. The trauma of going to court, the inherent delays in a judicial proceeding, the health consequences of those delays, and the inevitable public scrutiny of the most private of decisions render futile a mature minor's attempt to exercise her constitutional right to choose an abortion. Thus, these facts show that, contrary to prior presumptions, compelled parental involvement – even with a bypass – neither advances the best interests of minors nor achieves any other legitimate state interest.

ARGUMENT

I. THIS COURT HAS NEITHER MANDATORY NOR DISCRETIONARY JURISDICTION TO EXAMINE THE ISSUES HARTIGAN PRESENTS FOR REVIEW.

A. The Judgment Of The Court Of Appeals Did Not Finally Determine The Constitutionality Of The Illinois Statute And Cannot Be Reviewed Under The Restrictive Provisions Of § 1254(2).

This Court does not have mandatory jurisdiction over defendant's appeal because neither prerequisite to the narrow jurisdictional grant provided by section 1254(2) can be met. The Seventh Circuit did not enter a final judgment and did not declare a state statute invalid "as repugnant to the Constitution, treaties or laws of the United States. . . ." 28 U.S.C. § 1254(2).

Section 1254(2), which derives in part from the Judiciary Bill of 1925, accedes to the Court's desire for "drastic limitations" upon its obligatory jurisdiction. *See* Frankfurter & Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1 (1928). *See also* Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 5 (1925). Appropriately construed to have narrow dimensions, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 43 (1983), this statutory grant allows the Court to avoid the obligatory resolution of insignificant or premature cases and leaves the Court free to address issues of critical importance. *See* Frankfurter & Landis, 42 HARV. L. REV. at 18. Defendant's expansive interpretation of jurisdiction under § 1254(2) is contrary to this sound jurisprudence.

1. The Seventh Circuit did not declare unconstitutional either the judicial bypass scheme or the entire Parental Notice of Abortion Act.

Section 1254(2) jurisdiction exists *only* in those cases in which a statute is struck down expressly on federal constitutional grounds. *See Silkwood*, 464 U.S. at 247. *See also California Coastal Comm'n v. Granite Rock Co.*, ___ U.S. ___, 107 S. Ct. 1419, 1424 (1987) (cases which restrain an exercise of state authority but do not invalidate state statute do not fall within Court's appellate jurisdiction under § 1254(2)); and *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 292-95 (1982); *Public Service Comm'n of Indiana v. Batesville Telephone Co.*, 284 U.S. 6, 7 (1931). The very text of the court of appeals' decision "vacat[ing] the district court's holding that the Act is unconstitutional," 763 F.2d at 1545, App. at 23, belies defendant's claim that "the decision of the Court of Appeals is a definite adjudication of the constitutional validity of the Act on its face." (Def. Supp. Br. at p. 10.) Until the court of appeals can render a dispositive determination of constitutionality, defendant's request for review is inappropriate.

The Illinois Act is not complete. Section 5 of the statute specifically creates a right of appeal from an adverse circuit court ruling. It provides that:

> (f) An expedited confidential appeal shall be available, as the [Illinois] Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice[;]
>
> and,
>
> (g) The [Illinois] Supreme Court is respectfully requested to promulgate any rules and regulations necessary to ensure that proceedings under this Act are handled in an expeditious and confidential manner.

Ill. Rev. Stat. ch. 38, ¶ 81-65(f), (g) (1980).

The Seventh Circuit recognized that the Illinois Parental Notice of Abortion Act was not complete and that the General Assembly was prohibited, under the Illinois Constitution, from creating the appellate safeguards required by this Court's decisions in the area of involuntary parental involvement. *Zbaraz*, 763 F.2d at 1540, App. at 12-13 (construing ILL. CONST. art. VI, § 16.) Cognizant of this state constitutional barrier to a complete and final adjudication of the lawsuit, the Seventh Circuit found that:

> [T]he proper course of action would appear to be to enjoin enforcement of the statute until the Illinois Supreme Court promulgates rules .... This would comport with the Illinois legislature's expressed intention that such rules be promulgated and would allow a complete review of the statute to determine its constitutionality.

763 F.2d at 1544, App. at 20.[2]

Deference to state law led the Seventh Circuit to avoid a premature constitutional decision. Surely, this deference does not create a declaration of "repugn[ance] to the Constitution ... of the United States ..." as is necessary to invoke § 1254(2) jurisdiction.

2. The court of appeals did not issue a final order.

As set forth in plaintiffs' initial brief (Pl. Br. at 13-22), defendant does not present a final judgment for this Court's review. Contrary to defendant's claim (Def. Supp. Br. at 9), the Seventh Circuit's decision does not constitute "an effective determination of the litigation." By postponing determination of the constitutionality of the Act's bypass

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[2] The General Assembly reiterated this request in its 1986 resolution, asking the Illinois Supreme Court "to promulgate rules for confidential and speedy appeals ... in order for the Illinois Parental Notice of Abortion Act of 1983 to be enforced ...." (Senate Joint Resolution No. 69, Pl. Br. at App. C.) The Court has yet to issue rules.

mechanism because it is incomplete, the Seventh Circuit made clear that any future proceedings would inevitably require resolution of federal constitutional issues. When "it appears that other federal issues will be involved in the trial court," it is axiomatic that there is no final appealable judgment. *Flynt v. Ohio*, 451 U.S. 619, 621 (1981); *see also San Diego Gas & Electric Co.*, 450 U.S. at 632-33. This factor alone, as plaintiffs demonstrated in their initial brief (Pl. Br. at 13-22), removes the instant case from the ambit of the narrow exception to the finality doctrine espoused by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975), in which the future proceedings involved only state law issues.

Adherence to the finality rule conserves judicial resources by avoiding costly successive appeals, as well as premature and perhaps unnecessary adjudication of constitutional issues. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-72 (1948). *See also Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S. Ct. 989, 1009-11 (1987) (Stevens, J., dissenting). Thus, "only when observance of [the rule] would practically defeat the right to any review at all," *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940) (construing 28 U.S.C. § 225(a)), can a litigant escape its enforcement.

Defendant contends that, without immediate review here, he will be denied the opportunity to defend the facial validity of this Act, including the incomplete section 5. (Def. Supp. Br. at 12-13.) If the legislature wanted to test the validity of a statute without rules, it first would have to enact such a statute. Hartigan cannot take it upon himself to rewrite the statute he is charged with defending. Nor can he obtain any review of section 5, until it is complete with the requested rules. *See* discussion at pp. 12-20, *infra*. The Illinois General Assembly passed this legislation with a bypass and a request for supplemental rules. That is the

law in Illinois, and defendant cannot change that fact to create jurisdiction.

The interdependence of section 5 and the remaining sections of this Act precludes § 1254(2) review of the statute as a whole. The Act cannot go into effect without the rules requested in section 5. Therefore, Supreme Court review of the statute, including the waiting period in section 4 and its exceptions in section 7, would be premature and purely advisory prior to the promulgation of rules.[3] Thus, contrary to defendant's argument (Def. Supp. Br. at 9), "reunification" by this Court of the two issues raised in the jurisdictional statement does not change the fact that the judgment below was not the final one that § 1254(2) demands.

Moreover, in light of this interdependence, sections 4 and 7(a) can be considered by this Court after the conclusion of all proceedings below.[4] "[I]t is settled that we

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[3] Application of prudential considerations, which guide the exercise of jurisdiction, "prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580 (1985) (citation omitted). These constraints are to be applied consistently because the constitutional prohibition against advisory opinions is not "a doctrine of convenience." *California Federal Savings and Loan Ass'n v. Guerra*, ___ U.S. ___, 107 S. Ct. 683, 698 (1987) (Scalia, J., concurring). *See also* pp. 12-20, *infra*.

[4] Hartigan holds the power to ameliorate his concern that if no rules are forthcoming this case will pend indefinitely. Most immediately, he could dismiss his appeal and provide the Illinois Supreme Court with an opportunity to act, "unfettered by the prospect of further federal interpretation." (*See* Def. Br. at 29.) In the alternative, Hartigan could either petition the Illinois Supreme Court directly to initiate rulemaking or move the district court to modify the injunction, should rules never materialize. Such a modification

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may consider questions raised on the first appeal, as well as 'those that were before the court of appeals upon the second appeal' "; *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964) (citation omitted); *see also Reece v. Georgia*, 350 U.S. 85, 87 (1955) (Court has jurisdiction to consider all substantial federal questions determined in earlier stages of litigation even if first decision became law of the case). This power to probe issues resolved in an earlier appeal is but a "necessary correlative" of the rule which limits this Court's mandatory jurisdiction to the examination of final judgments. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949) (citation omitted).[5] Defendant, thus, has demonstrated no reason for departing from the strict requirements of § 1254(2).

B. Defendant's Request For Review Offends The Principles Underlying Certiorari Jurisdiction.

1. Hartigan's request for expanded review asks this Court to issue an advisory opinion.

In his attempt to establish jurisdiction, Hartigan presents for advisory review by this Court a hypothetical statute very different from the one enacted by the

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4 *(Continued)*

would be appealable under 28 U.S.C. § 1291(b), and, if the entire Act were finally declared unconstitutional, to this Court under § 1254(2).

[5] Defendant's continued reliance upon cases discussing exceptions to the finality requirement limiting the jurisdiction of the courts of appeals under 28 U.S.C. § 1291 (Def. Supp. Br. at 10-11, 13) does not justify extension of this Court's jurisdiction under § 1254(2). First, the primary objective behind the jurisdictional limitations contained in § 1254(2) – preserving the Supreme Court's scarce resources as the one truly national court – does not operate to limit § 1291 jurisdiction. Second, as set forth in plaintiffs' initial brief, pp. 19-22, defendant cannot satisfy the three criteria necessary to invoke the collateral order rule.

Illinois General Assembly. He claims that he is entitled to immediate review on two issues: whether the Constitution demands the rules the Illinois legislature specifically requires to complete the statute, and whether "the Constitution mandates an alternative procedure when a statute only requires parental notification." (Def. Supp. Br. at i.)

Hartigan's new argument that no bypass whatsoever is needed repudiates the explicit terms of the statute he is charged with defending. It also contradicts the position he took in the lower courts where he argued that "[t]he State may require . . . notice . . . if it also provides a judicial procedure to bypass notice to [the] parent or guardian . . . ." (Def. Memo. in Opposition to Pl. Motion for Prel. Injunction at 9; *see also* Br. of Def.-App. to Seventh Cir. at 21.)[6] Indeed, defendant's very presentation of the bypass issue in his jurisdictional statement to this Court – "whether the judicial alternative . . . provides a constitutionally sufficient framework" – explicitly recognizes the need for such an alternative to compelled parental involvement.[7] (Def. Supp. Br. at i.)

Hartigan's request now for advice on a nonexistent statutory scheme offends the basic precepts guiding the

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[6] Hartigan claims now that the Seventh Circuit "misinterpret[ed] this Court's opinions" (Def. Supp. Br. at 29), by requiring a judicial alternative to parental notice. His claim is erroneous, and has been rejected by other lower federal courts *see* n. 30, *infra*. Moreover, this claim ignores the fact that Hartigan urged this conclusion upon the Court of Appeals.

[7] By framing the issue in this manner, Hartigan is barred by Supreme Court Rule 34 from now asking this Court to determine an additional issue. Supreme Court Rule 34(a) provides, in pertinent part:

> The phrasing of the questions presented [in the brief] need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents.

Court's exercise of jurisdiction. From its earliest days, the Court consistently has refused to issue opinions "in the nature of advice concerning legislative action . . . ." *Muskrat v. United States*, 219 U.S. 346, 362 (1911). *See also* Correspondence of the Justices, Letter from Chief Justice John Jay and the Associate Justices To President George Washington, August 8, 1793, reprinted at Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 65-66 (2d ed. 1973) (constitutional power of giving opinions "seems to have been *purposely* as well as expressly united to *executive* departments) (emphasis original).

Even if this Court were to hold that the Constitution did not demand a judicial bypass or specific appellate rules, that holding would not change the explicit bypass requirements of the Illinois Act. This Court's decision on the issues Hartigan now attempts to present would have no more force than that of a recommendation to the Illinois General Assembly that, if it chooses to amend its law, it need not provide a bypass alternative. *Compare Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 114 (1948) (Court will "render no judgments not binding and conclusive on the parties"). It is not this Court's role to provide legislative recommendations.

2. Important issues of federalism make the extension of jurisdiction inappropriate.

Concerns of comity militate strongly against reviewing this case under either subsection of § 1254. Defendant asks this Court to interpose itself in a stalemate involving the defendant, who is the Attorney General of the State of Illinois, the Illinois General Assembly, and the State Supreme Court, whose inaction has left the defendant with a statute he cannot enforce. Attorney General Hartigan should not be allowed to use this Court to bludgeon into action other branches of Illinois State Government.

In the absence of action by the Illinois Supreme Court, Hartigan seeks to enforce the statute without the appellate rules that the legislature requested. In taking this position, he would impose his own will while depriving the Illinois Supreme Court of its role under the Illinois Constitution. *Compare People v. Cox*, 82 Ill.2d 268, 274-75, 412 N.E.2d 541, 545 (1980) (Illinois Supreme Court has exclusive power to regulate appellate practice and procedure; any other approach would destroy "a basic tenet of [the Illinois] democratic form of government" and would render nugatory "the relevant [Illinois] constitutional provisions") (citation omitted); *People v. Jackson*, 69 Ill.2d 252, 255, 371 N.E.2d 602, 604 (1977) (question of who regulates judicial procedures is a "controversy [which] involves separation of powers" issues).

Likewise, Hartigan should not be permitted to usurp the power of the legislature with his attempt to litigate issues the statute does not raise. The review he seeks would be appropriate only after a legislative amendment to the Illinois Parental Notice of Abortion Act to eliminate either the request for rules (sections 5(f) and (g)) or to eliminate the entire bypass alternative.[8] Until that time, the federal courts can play no further role in the resolution

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[8] The pendency of a lawsuit has not prevented the Illinois General Assembly from amending its abortion legislation. The General Assembly amended the Parental Notice of Abortion Act after the district court proceedings. *See Zbaraz*, 763 F.2d at 1535, App. at 3. *See also Charles v. Daley*, 749 F.2d 452, 455 (7th Cir. 1984), *dism'd sub nom. for want of juris., Diamond v. Charles*, ___ U.S. ___, 106 S. Ct. 1697 (1986) (General Assembly amended abortion law twice during pendency of litigation).

Moreover, Hartigan could issue a nonbinding opinion as to the need for such rules, Ill. Rev. Stat. ch. 14, ¶ 4 (1985), thereby encouraging the General Assembly to repeal the provisions in the statute which request rules. Hartigan should not, however, be allowed to demand this Court's jurisdiction to bolster his position before the Illinois legislature.

of these issues. *See Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937).

The Seventh Circuit's decision balanced these concerns of state sovereignty against the need to protect the fundamental rights of plaintiffs. Given defendant's desire to enforce the Act without the rules even he conceded were necessary, the Seventh Circuit was obligated to protect the plaintiffs' constitutional rights by providing interim injunctive relief, *cf. Withrow v. Larkin*, 421 U.S. 35 (1975); *Harrison v. N.A.A.C.P.*, 360 U.S. 167 (1959).[9] By avoiding premature adjudication of the Illinois Act's constitutionality, the Seventh Circuit alleviated the tensions inherent in a system with federal and state components. Because this case did not fit within any of the traditional abstention categories, the Seventh Circuit could not properly abstain

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[9] In the lower courts, defendant conceded the Act's incompleteness by arguing that the bypass provisions should not be declared unconstitutional because "[s]ections 5(g) and 5(f) plainly contemplate the issuance of *new* rules by the Illinois Supreme Court to assure expeditious and confidential proceedings and appeals." (Def. Memo. in Opposition to Pl. Motion for Prel. Injunction, at 10 n. 3 (emphasis original).) In the face of this concession, defendant urged the district court and the court of appeals to abstain and to dismiss plaintiffs' case. (Def. Reply Br. to Pl. Memo. in Support of Motion for Summ. J. at 5-6; Br. of Def.-App. to Seventh Cir. at 34-35). He offered no suggestion of interim relief; to the contrary, he sought to enforce the statute.

By way of comparison, in *Harrison*, the federal court abstained without providing interim relief. This was possible, notwithstanding the risk to fundamental constitutional rights, only because the State, defendant in that action, agreed not to enforce the challenged statute until the federal court ultimately could decide constitutionality. *Harrison*, 360 U.S. at 179. *See also American Booksellers Association, Inc. v. Webb*, 590 F. Supp. 677, 685-86 (N.D. Ga. 1984) (interim relief appropriate to mitigate impact of plaintiffs' pursuit of constitutionally protected activity).

from the exercise of federal jurisdiction.[10] Nonetheless, the Seventh Circuit appropriately structured its decision to serve the competing concerns coursing through the abstention doctrine, and thereby gave full effect to the principles of federalism that underlie not only § 1254(1) and (2) but the other doctrines defining federal court jurisdiction.

By waiting for the Illinois Supreme Court to act, the court of appeals assured that the eventual federal judgment would be based on the complete product of the State. *Compare Harrison*, 360 U.S. at 178 (statute should be exposed to state construction first so that "federal judgment will be based on something that is a complete product of the State . . . ."). Should rules promulgated by the Illinois Supreme Court assure young women a prompt, private appeal, the Seventh Circuit's deferral of judgment may substantially alter any federal constitutional issue posed for this Court's review. *See Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 311-12 (1979). Furthermore, by allowing the Illinois Supreme Court a meaningful opportunity to act, the Seventh Circuit avoided needless federal intervention into Illinois' state constitutional scheme of dividing power among the legislature, the

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[10] Traditional abstention was inappropriate because there was no parallel state proceeding and, in any event, the Illinois Supreme Court, when it acts, would be exercising its rulemaking authority rather than its adjudicatory authority.

Contrary to defendant's argument (Def. Supp. Br. at 25), certification to the Illinois Supreme Court under Illinois Supreme Court Rule 20 likewise would have been inappropriate. Rule 20 allows certification when "there are no controlling precedents [of the Illinois Supreme Court]." Ill. S. Ct. Rule 20 (Ill. Rev. Stat. ch. 110A, ¶ 20). Here, however, the Illinois Supreme Court would not be called upon to decide any unclear questions of state law. There is simply no ambiguity involved – section 5 of the Act explicitly requests the promulgation of rules to assure an expeditious and confidential appeal.

judiciary and the executive branch, including Attorney General Hartigan. This evidences appropriate respect for state functions.

3. The risk of multiple appeals makes review inadvisable at this time.

The Seventh Circuit's decision protected both the federal and state interests involved. Dismissal of this appeal, while leaving the lower courts decision in place, would avoid the costs and delays of a piecemeal approach to jurisprudence. By contrast, Supreme Court review at this premature juncture raises the specter of a second appeal to this Court after the Illinois Supreme Court has promulgated the necessary rules and the lower federal courts have passed on their constitutionality.[11]

If review is granted now, defendant will have created a situation that necessitates further proceedings both in the lower court and ultimately perhaps in this Court.

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[11] In a similar case, the Third Circuit, affirmed by this Court, deferred a ruling on the constitutionality of the bypass alternative until the Pennsylvania Supreme Court promulgated the necessary rules. *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 297 (3d Cir. 1984), *aff'd*, ___ U.S. ___, 106 S. Ct. 2169, 2177 n. 9 (1986). As anticipated, the Pennsylvania Supreme Court adopted rules, the adequacy of which are now pending before the district court for a complete adjudication. In *Thornburgh*, this Court reviewed other provisions of the omnibus statute that could become independently effective, for example, the second physician requirement and the "informed consent" requirement. The provisions at issue here – the waiting period and the bypass – are interdependent such that the waiting period could never go into effect until a constitutionally sufficient bypass exists. (See Pl. Br. at 21.) Review now would encourage piecemeal review of the most damaging sort. Thus, dismissal of this appeal on jurisdictional grounds would not be the first time the Court avoided a request for premature review in this context. *Thornburgh v. American College of Obstetricians and Gynecologists*, ___ U.S. ___, 106 S. Ct. 2169, 2177 n.9 (1986).

The policy against piecemeal review conserves the Court's resources, and assures that the Court will consider only those issues appropriately developed for its review. After promulgation of rules, additional proceedings below are likely to involve the introduction of substantial evidence as to the length of the delay occasioned by the bypass procedure and appeal; the risks of exposing the young woman's privacy; the legal, medical, and emotional consequences of such a bypass; as well as the consequences of the compelled notice requirement itself. This evidence should be examined by the district court in the first instance to create the factual record necessary for consideration on appeal. Only after the statute is complete and its full effects evaluated by the lower courts is review by this Court appropriate. Carefully framed findings of this sort prepare the Court for the important task of ascertaining the constitutional principles that govern adjudicated facts. Frankfurter & Landis, 42 HARV. L. REV. at 23; *City of Hammond v. Schappi Bus Line, Inc.*, 275 U.S. 164, 171-72 (1927). *Cf. Storer v. Brown*, 415 U.S. 724, 740 (1974).

Nowhere is the need for factual development more important than in the adjudication of fundamental rights, such as the right to privacy. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Justice Stevens predicted that the constitutional questions involving parental involvement in a minor's abortion decision would "appear quite different" in the presence of a factual record indicating real impact of an operating bypass law. *Bellotti II*, 443 U.S. at 656 n.4 (Stevens, J., concurring). The factual record produced in challenging the Minnesota parental notice statute, *see Hodgson*, 648 F. Supp. at 759-70, bears out that prediction and provides the carefully framed factual findings with which to evaluate the actual, as opposed to hypothetical, impact of a notice statute with an operative judicial bypass. This case, by contrast, presents an incomplete statutory framework and, accordingly, an incomplete record which cannot adequately

demonstrate the concrete effects and implications of the notice and bypass provisions.

4. Hartigan has not justified his plea that this Court invoke its jurisdiction.

As the appellant, Hartigan has the burden of affirmatively establishing this Court's jurisdiction. *Republic Natural Gas*, 334 U.S. at 70-71. The absence of a final judgment declaring the Illinois Parental Notice of Abortion Act repugnant to the Constitution prevents Hartigan from satisfying § 1254(2). The risk of rendering an advisory opinion, coupled with the inefficiencies inherent in the piecemeal adjudication of a yet-to-be completed statute, dictates against the exercise of discretionary review under § 1254(1). Moreover, the traditional factors warranting certiorari, such as a conflict among the circuits or with a decision of this Court, are not present.[12] Accordingly, considerations of prudent judicial administration, *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976), compel adherence to the Seventh Circuit's interlocutory judgment and the dismissal of this premature appeal.

II. THE ACT'S INCOMPLETE JUDICIAL BYPASS PROCEDURES ARE INSUFFICIENT AND CANNOT MITIGATE THE UNCONSTITUTIONAL BURDENS OF COMPELLED PARENTAL INVOLVEMENT.

Established precedent compels rejection of Hartigan's unsupported claim that the incomplete Illinois Act creates a constitutionally sufficient scheme for mandating involuntary parental involvement. This Court held in *Bellotti II* that if a state enacts a parental consent

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[12] *See* Pl. Br. at p. 26 n.23 (lower federal courts consistently have struck down mandatory waiting period); and p. 32 n. 30, *infra* (lower federal courts consistently have required bypass alternative to parental involvement requirements).

requirement, it must also provide an alternative to that parental involvement.[13] A pregnant minor, in consultation with her physician and independent of her parents' wishes, must be given an opportunity to demonstrate that she is mature and well enough informed to make the abortion decision, or that, despite her immaturity, an abortion would be in her best interest. 443 U.S. at 643-44. Further, such an alternative "must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.* at 644.

The judicial bypass procedures contained in section 5 of the Illinois Act, without the contemplated and requested rules, do not meet these requirements.

A. The Act Fails To Designate Specific, Prompt Appellate Procedures.

Nothing in the incomplete Act or under existing Illinois Supreme Court rules assures that any appeal will be completed with sufficient expedition to allow the young woman an effective opportunity to secure an abortion. Under the present system, both the decision to expedite the appeal and the timing of every step of the appellate process are at the complete discretion of the appellate court. Absent specific regulation that accounts for the special concerns of the bypass situation, a young woman's abortion

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[13] For the reasons discussed below at 31-35, the burdens imposed upon young women as a result of parental notice statutes are as severe as the burdens stemming from consent statutes. Consequently, the same standards are appropriately used to evaluate the constitutionality of either requirement. *See Akron*, 462 U.S. at 427 n.10. However, recently validated facts demonstrate that the bypass alternative to compelled parental notice is itself burdensome to a young woman seeking to effectuate her constitutionally protected choice. *See* pp. 35-39, *infra*.

right may be seriously at risk because of an "expedited" appeal which may consume several months. The uncertain possibility that a prompt appeal *might* occur does not adequately protect a young woman's constitutional rights.[14]

Although a pregnant minor could, as defendant asserts (Def. Supp. Br. at 24), file a notice of appeal immediately after denial of her petition in the trial court, the clerk of that court has five days in which to transmit that notice to the appellate court for docketing. Ill. S. Ct. Rule 303(a)(4) (Ill. Rev. Stat. ch. 110A, ¶ 303(a)(4)). Only then, and only if the young woman can secure the agreement of any other parties, can a motion for an expedited appeal under Illinois Supreme Court Rule 311 be made.[15]

It is not clear whether the Illinois Parental Notice of Abortion Act anticipates participation by parties other than the young woman.[16] If other parties do participate and

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[14] The court in *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1142-43 (N.D. Ohio) *appeal dism'd*, 805 F.2d 1033 (6th Cir. 1986), found that a provision giving the appellate court discretion to shorten the statutory time periods did not vitiate the unconstitutionality of the statute.

[15] Illinois Supreme Court Rule 311 (Ill. Rev. Stat. ch. 110A, ¶ 311) provides:

> Any time after filing the docketed statement in the Appellate Court the parties may agree to have their case placed on an accelerated docket. The agreement shall be in the form of a motion signed by an attorney for each party and may provide for submission of an agreed statement of facts in lieu of a record, and memoranda in lieu of formal briefs. The court may then enter an order setting forth an expedited schedule for the disposition of the appeal.

[16] Section 5(b) of the Illinois Act provides for the appointment of a guardian ad litem ("G.A.L.") who, of course, may seek to participate in an appeal. *Compare In re K.M.B.*, 123 Ill. App. 3d 645, 462 N.E.2d 1271 (4th Dist. 1984) (G.A.L. in juvenile delinquency proceeding has obligation to advise court of her opinion as to minor's best interests even if that recommenda-

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their agreement cannot be secured, expedition is thwarted. Indeed, Rule 311's requirement of agreement would allow the G.A.L., or any other party, to deny a young woman a prompt appeal simply by opposing her motion, for any reason whatsoever.

Significant delay will ensue even if all parties agree to a Rule 311 motion, because the rules providing for resolution of all motions include a built-in delay. Illinois Supreme Court Rule 361 provides that: "[e]xcept in extraordinary circumstances, no motion will be acted upon until the time for filing objections [three to five days] has expired," Ill. S. Ct. Rule 361(d) (Ill. Rev. Stat. ch. 110A, ¶ 361(d)), or "within such further time as the court or a judge thereof may allow." Ill. S. Ct. Rule 361(b)(2) (Ill. Rev. Stat. ch. 110A, ¶ 361(b)(2)).[17]

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16 *(Continued)*

tion is contrary to minor's wishes). In an analogous situation to proceedings that might occur under this Act, an Illinois circuit court appointed a G.A.L. to represent a fetus in a case in which a woman sought authority to approve an abortion for her mentally retarded daughter. *See In re Estate of D.W.*, 134 Ill. App. 3d 788, 481 N.E.2d 355 (1st Dist. 1985), discussed *infra* at p. 25.

In addition to the G.A.L., the State itself might seek to participate. Such participation would be consistent with the Attorney General Hartigan's position, expressed in this case, that no minor ought to be permitted to obtain an abortion without prior notice to both of her parents in any circumstances. (*See* Def. Supp. Br. at 31-32.)

[17] Defendant cites no support for his claim that the court would decide the motion immediately. (Def. Supp. Br. at 24-25.) Furthermore, the consideration of motions on appeal is subject to the vagaries of practice of the five different districts of the Illinois Appellate Court. (*See* Ill. Rev Stat. ch. 37, ¶ 25, dividing Illinois Appellate Court into five districts.) Of the five districts of the Appellate Court, none has any written rules with respect to emergency motions or motions for expedited hearings. Only one, the First District sitting in Chicago, has any rules concerning the handling of motions, and those rules precipitate

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Even if a Rule 311 motion is granted, a young woman faces further delays in presenting the substance of her appeal.[18] Defendant claims, for example, that "[u]nder Supreme Court Rule 311, the parties – in this case the minor – *may* substitute a statement of facts and a memorandum instead of a formal record and brief." (Def. Supp. Br. at 23) (emphasis added). However, Rule 311 only permits the filing of an "agreed statement of facts." Presumably, it is the agreement of the parties that gives the court sufficient assurance of the accuracy of the statement to excuse the filing of a certified transcript. If an agreement cannot be secured, or if there is no opposing party with whom to agree, *see* discussion at pp. 22-23, the appellate court may well require the formal record, including the transcript, of the proceedings below. This process may consume an additional 49 days.[19] Thus, although the absence

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17 *(Continued)*

further delay. Because of the volume of cases before it, the First District is divided into five divisions. (Ill. S. Ct. Rule 22(a), as amended by MR 1685, Dec. 13, 1974.) Each division sits one day per week. The First District's Rule 3 provides that in the normal course, "all motions must be made before the division to which the case is assigned." (Appellate Court First District Rule 3, published in Ill. Rev. Stat. ch. 110A, ¶ 803.) Rule 3 therefore delays consideration of the motion for expedited proceedings until such time as the appropriate division sits to hear motions.

[18] Of course, if the Rule 311 motion is not granted, the time that will be lost to the appeal process in the crowded state court system is unpredictable and, without question, will deny the young woman any opportunity to effectuate her abortion choice without involving both of her parents.

[19] Under Illinois Supreme Court Rule 323(b)(Ill. Rev. Stat. ch. 110A, ¶ 323(b)), the court reporter has 49 days from the filing of the notice of appeal to prepare the report of proceedings. While the court reporter ought to be able to prepare a transcript in less than 49 days, there is nothing in the Act that requires such expedition. (In contrast, the Missouri statute at issue in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), required that the record be completed within five days of the notice of appeal. *Ashcroft*, 462 U.S. at 491 n.16, *discussing* Mo. Rev. Stat.

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of opposing parties could speed up a motion under Rule 311, their absence from the actual appeal might render ineffectual procedures otherwise designed to assist in expedition.

Documented appellate delays belie defendant's claim that existing Illinois Supreme Court rules are sufficient under the standards articulated in *Bellotti II*. Even in an abortion context, where "time is of the essence," an expedited appeal will at best take almost two weeks. *In re Estate of D.W.*, 134 Ill. App. 3d 788, 481 N.E. 2d 355 (1st Dist. 1985), involved an appeal from an order limiting the authority of a mother seeking to be appointed temporary guardian for her 18-year-old daughter, who was severely mentally retarded and 12-13 weeks pregnant. The mother asked for, but was denied, authority to consent to an abortion for her daughter.[20] Notwithstanding the relatively advanced state of D.W.'s pregnancy, the appellate court did not enter its order overturning the trial court's decision until eleven days after the mother filed her notice of appeal; it did not issue its mandate until four days later.[21] 134 Ill. App. 3d at 789, 481 N.E.2d at 355. The

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19 *(Continued)*

§ 188.028.2(6) (Supp. 1982).) It also should be noted that the Act makes no provision for payment of the substantial cost that would be entailed in obtaining an expedited transcript.

[20] The unrebutted evidence at trial showed that an abortion would have been in the young woman's best interests and was recommended by the physicians who testified. D.W. did not understand the concept of pregnancy and would have been traumatized by labor and delivery. She also would not have been capable of caring for a child if the pregnancy were carried to term. *D.W.*, 134 Ill. App. 3d at 790, 481 N.E. 2d at 356.

[21] D.W.'s mother was represented by a team of attorneys associated with the American Civil Liberties Union, an organization with significant resources and a great deal of experience in reproductive rights and appellate litigation. A young woman seeking to appeal a denial of a petition under the Act, if she is represented at all, is likely not to have such substantial resources at her disposal.

complete process had consumed more than three weeks from the time the petition initially had been filed in the circuit court on July 8, 1985. 134 Ill. App. 3d at 789; 481 N.E.2d at 355. Thus, D.W. was approximately 16 weeks pregnant at the conclusion of the judicial proceedings.[22]

Notwithstanding prolonged appellate delays under the existing rules governing expedition, defendant argues that, because *Ashcroft* requires only that the state provide a "framework" to assure expedition, the appeal provisions of the Act are constitutionally adequate. This argument fails, however, because the Illinois Act falls well short of providing the assurance of the statute at issue in *Ashcroft*.[23]

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[22] Even the ineffective "expedition" in *D.W.* is not assured by the present rules. In another example, the appellate court has yet to decide a case almost *two months* after the motion for expedition was filed and granted. In *In re E.G.*, No. 87-1791 (1st Dist. 1987), a minor was adjudicated "medically dependent" because she, and her parents, refused to consent to blood transfusions because of their religious beliefs. The trial court appointed a temporary guardian to consent to the transfusions. The minor appealed and filed a motion for expedited review, arguing that the course of transfusions constituted an ongoing violation of her First Amendment rights. E.G. moved to expedite on June 15, 1987. The Appellate Court granted the motion on June 18, 1987, and, more than a month later, heard oral argument on July 22, 1987. As of the date of this brief, the court has yet to rule.

[23] The *Ashcroft* statute provided in relevant part that:

> The notice of intent to appeal *shall* be given within twenty-four hours from the date of issuance of the order. The record of appeal *shall* be completed and the appeal *shall* be perfected within five days from the filing of notice to appeal. Because time may be of the essence regarding the performance of the abortion, *the supreme court of this state shall, by court rule, provide for expedited appellate review* of cases appealed under this section.

Ashcroft, 462 U.S. at 491 n.16, *quoting* Mo. Rev. Stat. § 188.028.2(6) (Supp. 1982) (emphasis added).

The Missouri statute expressly provided for expedited notice of appeal within 24 hours from the issuance of the trial court order and, completion of the record and perfection of the appeal itself within five days.[24] The Missouri statute also included a direct *mandate* to the Missouri Supreme Court to provide expedited appeals in waiver proceedings. Mo. Rev. Stat. Stat. § 188.028.2(6) (Supp. 1982). As a result, Justice Powell concluded in *Ashcroft* that it was reasonable to assume that the Missouri courts would comply with the statute, and thus with the constitutional requisites set forth in *Bellotti II*, 462 U.S. at 491 n.16. In contrast to the Missouri statute, however, neither Illinois statutory provisions nor existing Illinois Supreme Court Rules contain definitive provisions.

The need for specific rules which unequivocally assure the availability of a prompt appeal is obvious given the serious health consequences of delaying, by even a week, effectuation of the abortion decision.[25] A delay of weeks,

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[24] Defendant baldly asserts that the appeal by a young woman in Illinois "could be perfected" within the same five-day period mandated by the Missouri statute. (Def. Supp. Br. at 25.) Once again, the mere possibility of expedition is not enough. *See Akron Center For Reproductive Health v. Rosen*, 633 F. Supp. at 1142-43. In any event, such a speedy perfection is impossible under existing Illinois rules. An appeal is not ready for disposition – "perfected" – until after the motion for expedition has been resolved. Before this resolution can occur, however, the young woman could wait up to five days for docketing, see p. 22, *supra*; Def. Supp. Br. at 24-25, perhaps three to five more days for filing of objections, Ill. S. Ct. Rule 361(b)(Ill. Rev. Stat. ch. 110A, ¶ 361(b)), and, indefinitely for the court's resolution. Such prolonged delay here is hardly comparable to the quick perfection propounded by the Missouri statute.

[25] After seven weeks, the risk of major complications increases 20% with each week gestation. C. Tietze & S. Henshaw, INDUCED ABORTION: A WORLD VIEW 1986 at 103 (6th ed. 1986). The mortality rate increases approximately 20% with each additional week that the abortion is delayed from eight weeks to 15 weeks,

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which, in light of the experience of D.W. and E.G., appears to be the best that a young woman could hope for in Illinois, will have profound and deleterious consequences. A similar delay in the case of a minor whose pregnancy was even further advanced than D.W.'s could effectively preclude her from having an abortion. *See Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. at 1142-43 (Ohio parental notice of abortion statute unconstitutional because, *inter alia*, the appellate procedures might take as long as three weeks). *See also Akron*, 462 U.S. at 450 (waiting period unconstitutional, in part, because it increased risk to woman).

Without the rules specifically requested, neither the incomplete Act nor any existing Illinois Supreme Court Rule assures that a minor's appeal could be decided without unconstitutional, burdensome delays. In fact, it appears that an expedited appeal "as provided by rule" is unlikely to be expedited at all.

B. The Act Fails To Assure The Anonymity Of Minors Seeking Judicial Waiver Of The Notice Provisions.

Any statutory alternative to parental involvement must assure that the waiver procedure is completed with anonymity. *See Bellotti II*, 443 U.S. at 644. The statute upheld in *Ashcroft* assured anonymity by directing the minor to file her waiver petition in the trial court using only her initials. *Ashcroft*, 462 U.S. at 479 n.4. The Illinois Act is devoid of these necessary protections.

Defendant's hope that a young woman could obtain confidentiality simply by filing a petition under a

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25 *(Continued)*

and more rapidly after that. *Id.* at 109-10. *See also* Pl. Brief at 34; Brief Amici Curiae of American College of Obstetricians and Gynecologists, the American Academy of Pediatrics and the American Women's Medical Association at 13-16.

pseudonym or her initials is illusory. It certainly cannot be presumed that a young woman, upset by her plight, daunted by the prospect of "going to court" and unaided by counsel will be aware of the devices that may be available to avoid disclosure of her identity.[26] And it certainly cannot be presumed that a court clerk – without direction from the Act or any implementing rules – will know to advise a young woman of such options.

The cases cited by defendant in support of his claim that the Act adequately assures anonymity are inapposite. *JFS v. ABMJ*, 120 Ill. App. 3d 261, 458 N.E.2d 76 (1st Dist. 1983), and *Deere & Co. v. Finley*, 103 Ill. App. 3d 774, 431 N.E.2d 1201 (1st Dist. 1981), stand for the unexceptional proposition that a trial court may, in its discretion, enter protective orders in particular cases. At the most, these cases show that in an individual situation, the courts can protect a party's anonymity.[27] *Bellotti II* and *Ashcroft*, however, require more; the mere possibility that a

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[26] The Act does not provide for the assistance of counsel at all stages of the bypass procedure. Section 5(b) provides for counsel only after a petition is filed and then only at the specific request of the young woman. No provision is made for legal assistance in filing.

[27] *In re Roger B.*, 84 Ill. 2d 323, 418 N.E.2d 751, *appeal dism'd for want of a substantial federal question sub nom. Barth v. Finley*, 454 U.S. 806 (1981), also refutes rather than supports defendant's claim that the Act should be enforced even without supplemental rules. That decision simply enforced a statute which required the sealing of records of adoption proceedings and which allowed such records to be examined only "upon specific order of the court, which order shall name the person or persons who are to be permitted to examine such file." Ill. Rev. Stat. ch. 40, ¶ 1522. These detailed instructions to the clerks of court concerning the handling of confidential files under the Illinois Adoption Act (Ill. Rev. Stat. ch. 40, ¶ 1501 *et seq.*) contrast sharply with the generalities of the Parental Notice of Abortion Act.

proceeding might be anonymous is not enough.[28]

The failure of the Illinois Act, absent supplemental rules, to guarantee a private, anonymous judicial proceeding, is not an inconsequential defect. This Court repeatedly has recognized that "[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or of other third parties." *Bellotti II*, 443 U.S. at 655 (Stevens, J., concurring). Procedures that do not assure anonymity "raise the spectre of public exposure and harassment of women who choose to exercise their personal, intensely private right, in consultation with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right, and must be invalidated." *Thornburgh*, ___ U.S. at ___, 106 S. Ct. at 2182.

Given the authority of third parties, especially parents, over minors, *see Bellotti II*, 443 U.S. at 638, the incomplete procedures of section 5 fall far short of providing the protection to which a young woman is constitutionally entitled. The loss of privacy which is almost certain to occur, as well as the lack of a meaningful opportunity to secure a prompt appeal, demonstrate the Act's inadequacies and justify continuation of the injunction. Moreover,

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[28] *Thornburgh* illustrates the danger of not providing specific procedures to protect a young woman's anonymity. The Pennsylvania statute at issue in *Thornburgh*, like the Illinois Act, requested the State Supreme Court to promulgate rules governing confidentiality and promptness of disposition. When the State Supreme Court failed to do so, one county court adopted its own rules, which provided, *inter alia*, that the court should notify the minor's parents of the pendency of the petition. *Thornburgh*, 737 F.2d at 297. Such a provision was plainly unconstitutional. *See Bellotti II*, 443 U.S. at 646-47. The Third Circuit in *Thornburgh* properly, and necessarily, enjoined the enforcement of the parental consent provisions of the Pennsylvania statute pending promulgation of the necessary rules by the Pennsylvania Supreme Court. 737 F.2d at 297.

the incompleteness of the Act once again underscores the appropriateness of the Seventh Circuit's decision deferring review.

III. HARTIGAN'S ARGUMENT THAT PARENTAL NOTICE ALWAYS PROMOTES A MINOR'S BEST INTERESTS AND DOES NOT BURDEN HER CONSTITUTIONAL RIGHTS IS WITHOUT FOUNDATION.

A. This Court Previously Has Established That Parental Involvement Is Not Always In A Minor's Best Interests.

Hartigan can find no support for his new claim that the bypass mandated by this Court's prior decisions does not apply to parental involvement requirements in the form of notice rather than consent.[29] In *Akron*, 462 U.S. at 427 n.10, this Court concluded that the state's interest in encouraging parental involvement in a young woman's abortion decision "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement." Although the ordinance before the Court in *Akron* demanded parental consent, 462 U.S. at 439, the Court carefully articulated standards applicable to statutes mandating parental involvement, either through notice or through consent. 462 U.S. at 427 n.10. *See also H.L. v. Matheson*, 450 U.S. 398, 420 & n.9 (1981) (Powell J., concurring); *but see H.L.*, 450 U.S. at 410-13. In reaching its conclusion in *Akron*, the Court relied on *Bellotti II*, where it earlier had observed that "young pregnant minors, especially those living at home, are particularly vulnerable to

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[29] As set forth at pp. 12-13, *supra*, Hartigan, relying on the terms of the Illinois statute, urged a contrary position in the lower courts and his jurisdictional statement did not ask this Court to determine whether notice is the equivalent of consent. He therefore should be barred from raising it now.

their parents' efforts to obstruct both an abortion and their access to court." *Bellotti*, 443 U.S. at 647.[30]

In *Bellotti II*, the Court thus established, as a matter of constitutional fact, that parental involvement is not always in the minor's best interests. 443 U.S. at 643. Hartigan now challenges this constitutional fact with his argument that, despite the incompleteness of section 5, the Illinois Act is constitutional because the harmful consequences of compelled parental notice are less severe than the consequences of consent. He therefore concludes that a bypass is unnecessary. (Def. Supp. Br. at 32.)

Hartigan's challenge must fail, because he cannot produce evidence which is necessary before this Court will reconsider heretofor established constitutional facts. *See* Monahan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 254-59 (1985). The emptiness of Hartigan's contention is made all the more apparent by new adjudicatory facts as well as empirical data, which lead to the inescapable conclusion that state-compelled parental involvement is not in a young woman's best interests.

Without any contradiction by defendant, plaintiffs established in the district court here that mandatory parental involvement in a young woman's abortion decision often causes great fear and harmful stress, and may result in her "physical abuse or [her] being thrown out

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[30] In arguing that notice is not as burdensome as consent, Hartigan ignores the holding of *Bellotti II*, which struck down the Massachusetts consent statute requiring that notice be given to *all* parents concerning their daughter's initiation of the bypass alternative. Lower federal courts which have been asked to adjudicate the constitutionality of a parental notice statute have applied the standards used when adjudicating a parental consent statute. *See, e.g., Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983); *Hodgson*, 648 F. Supp. at 772 (D. Minn. 1986); *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. at 1131-33; *Glick v. McKay*, 616 F. Supp. 322, 324-25 (D. Nev. 1985); *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542, 546-47 (D. Me. 1979).

of the home . . . " (J. App. at 10.)[31] In the professional judgment of plaintiff-physicians, forced notification would be against the medical interests of such young women. (J. App. at 4-5, 7; *see also* J. App. at 9-10.)

Plaintiffs' evidence was confirmed by the district court in *Hodgson*, the only case to consider exhaustively the impact of an operative parental notice statute with a bypass alternative. In the course of a five week trial, the *Hodgson* court examined a parental notice statute which had been in effect almost five years. The court heard testimony from minors, counselors, physicians and parents.[32] The *Hodgson* court found that compelled notice produces great distress for the young woman, particularly if she fears her parents are "likely to react with psychological, sexual or physical violence." 648 F. Supp. at 764; *see also* 768-69, 778. Statutory exceptions for minors who fear such parental reactions do not provide meaningful relief because "[m]inors who are victims of sexual or physical abuse often are reluctant to reveal the existence of abuse to those outside the home." *Id.* at 764. Consequently, "[n]otification of an abusive or even disinterested absent parent may [actually be] disruptive or unhelpful [to the minor] at a time of acute stress." *Id.* at 764; *see also id.* at 768-69.

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[31] Neither defendant Hartigan nor defendant Daley introduced any evidence in the district court concerning the consequences of involuntary parental involvement or of the operation of the bypass alternative. Defendant Hartigan limited his evidentiary showing to a single affidavit by the Executive Secretary of the Illinois Legislative Reference Bureau, who only attested to the general severability rule to be applied when interpreting state statutes. (*See* J. App. at 17-18.)

[32] The Minnesota parental notice statute at issue in *Hodgson*, like the Illinois Act, required that notice be given to both parents of a young woman seeking to have an abortion. 648 F. Supp. at 764.

Mandatory notice also affects minors who voluntarily have consulted with one parent but not with the other because of fear of abuse toward either themselves or the notified parent. Such a situation was particularly burdensome, the *Hodgson* court ruled, because:

> [T]he minor must choose either to notify the second parent or to endure the court bypass procedure. Once again, the emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

648 F. Supp. 764; *see also id.* at 768-69, 778.

Faced with compelling evidence of the distress and actual harm suffered by young women as a consequence of this statute, the *Hodgson* court concluded that there was no factual basis upon which to find that compelled parental notice "furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." *Id.* at 775.[33]

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[33] The adjudicatory facts established in *Hodgson* are substantiated by the panel of the National Research Council, comprised of representatives of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine. After more than two years of studying teen pregnancy, the panel concluded that:

> Research [has not indicated] that legally required parental involvement helps teenage girls cope better with their choice to terminate the pregnancy. There is no evidence that it reduces the probability of subsequent unwanted pregnancies or serves any other purpose than to ensure that parents are aware of what their adolescent daughters are doing. There is, however, growing evidence that parental consent statutes cause teenagers to delay their abortions, if for no other reason than that they must undergo the de facto waiting period associated with finding a lawyer and gaining access to the courts. These delays may increase the health risks involved if they result in postponements until the second trimester of pregnancy. There is also growing evidence that many

(Footnote continued on the following page)

Hartigan fails to provide any factual support for his request that this Court reexamine constitutional facts established in *Bellotti II* and its progeny. Should the Court nonetheless accept Hartigan's unwarranted invitation to explore anew the presumption that parental notice is not always in a pregnant minor's best interest, it also must consider newly developed facts about these pregnant minors. These facts in turn compel a reexamination of the Court's further presumption that a parental notice or consent statute, with a bypass alternative, will advance the State's purported interest in protecting these young women in a manner that does not infringe upon their constitutional rights.[34]

B. Even With A Judicial Alternative, Compelled Parental Involvement Does Not Advance Any State Interest In Protecting Young Women.

Both the Seventh Circuit and the district court analyzed the Illinois Act within the constitutional framework set forth in *Bellotti II* and its progeny, including *Ashcroft*. In reaching its conclusions in *Bellotti II* and *Ashcroft*, the Court relied on two factual presumptions. First, it found that parental involvement is often – but not always – in a young woman's best interests. Second, the Court presupposed that a judicial alternative could avoid the harms of compelling parental involvement. *See Bellotti II*, 443 U.S. at 643.

Bellotti II and *Ashcroft* therefore quite clearly posit the abstract constitutionality of a mandatory parental

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[33] *(Continued)*

> adolescents in states with these statutes are traveling to nearby states to obtain services rather than go through the judicial bypass procedure.

RISKING THE FUTURE at 277.

[34] Defendant's request for expanded review leaves plaintiffs no choice but to briefly discuss these issues, notwithstanding the incomplete statute and the incomplete record. *See* pp. 12-20, *supra*.

involvement statute which provides a judicial alternative. This Court has never had the opportunity to examine the constitutionality of a parental involvement statute based on a record of the actual effect of such a law. When a fundamental right is involved, "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *Carolene Products Co.*, 304 U.S. at 153 (citation omitted). Well-established principles of constitutional review require courts "repeatedly to review the application of [settled constitutional] principles to particular facts." *Batson v. Kentucky*, ___ U.S. ___, 106 S. Ct. 1712, 1719 (1986).[35]

Adjudicatory and empirical facts developed from examination of actual parental involvement requirements call into question the factual premises upon which this Court's prior decisions rest. Most particularly, the evidence in *Hodgson* conclusively refutes the presumption that any burdens flowing from involuntary parental involvement can be ameliorated by a judicial bypass. This evidence also refutes the further presumption that a bypass achieves any legitimate state interest.

The *Hodgson* court "heard testimony of judges who collectively have adjudicated [more than] 90 percent of the parental notification petitions filed [under the Minnesota statute] since August 1, 1981." 648 F. Supp. at 766. "None of these judges, on direct or cross examination, identified a positive effect of the law." *Id.* Instead, the testimony

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[35] Such a factual examination is a critical component of the judicial role because the "principal justification for giving the independent review of legislation to the judiciary lies in the ability of a court to weigh constitutional claims on the basis of experience which was not available when the legislature acted." Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 76-77 (citing Hart & Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 77-79, 93 (1953)).

showed that such statutes "basically erect[ ] another barrier to abortion." *Id.* (citation omitted). Public defenders and guardians ad litem who participated in bypass proceedings reiterated the absence of any benefit and emphasized the burdens involved in the bypass. *Id.* at 767.

The impact of these proceedings on young women was traumatic. The *Hodgson* court found that some minors "are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term [against their best interests]." *Id.* at 763. Other young women who do go to court are so upset by the proceeding that "the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary." *Id.* at 764.

Notwithstanding the fact that the State of Minnesota operated its bypass in the most expeditious manner possible, *id.* at 762-63, the delay occasioned by the judicial process itself often stretched to a week or more. *Id.* at 763. Delays of this sort increase to a statistically significant degree the medical risk associated with the abortion procedure. Moreover, they are likely to push a minor into the second trimester of pregnancy, thereby necessitating "greater costs, inconvenience and medical risk." *Id. See also* RISKING THE FUTURE at 114, 194-95, 276-78; *Akron*, 462 U.S. at 429 n.11; and Russo, *Adolescent Abortion: The Epidemiological Context*, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES at 57 (G. Melton ed. 1986); Brief Amici Curiae of the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and the American Medical Women's Association at 13-16; and Brief Amici Curiae of Pregnant Minors in Minnesota and Massachusetts, *et al.*, at 18-29.

The burdens accruing from the judicial bypass proceedings are not offset by any corresponding advancement of

the state's purported interest in protecting young women.[36] The *Hodgson* court found that immature minors "rarely [sought] judicial authorization to terminate their pregnancies without parental involvement." 648 F. Supp. at 767. Instead, young women who "tend to be above average in intelligence, education, and personal motivation," sought out the bypass. *Id.* Thus, immature minors, for whom the bypass was intended as a parental substitute, were provided no meaningful relief; whereas mature minors, who have a constitutionally protected right to make the abortion decision without third party involvement, encountered unnecessary interference with their choice. *Id.* at 775.

The *Hodgson* court accordingly concluded that the judicial alternative, and parental notice itself, failed to further, in any meaningful way, a legitimate state interest. *Id.* at 768, 776. The court held specific requirements of the statute unconstitutional and, finding them inseverable, struck down the entire law. Based on its extensive factual findings, the court went on to comment that had it been writing "on a clean slate," it would have held the Minnesota parental notice statute unconstitutional notwithstanding a judicial alternative that satisfied *Bellotti II* and *Ashcroft*. *Hodgson*, 648 F. Supp. at 776.

A finding that a statute is facially valid has never prevented this Court from reexamining the statute in light of a record demonstrating the law's unconstitutional impact. Hartigan, however, has no basis for his attempt to reexamine settled constitutional questions, for the facts developed from an examination of an operative notice statute in no way support Hartigan's claim. If the Court, nevertheless, chooses to reach the expanded question

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[36] It is beyond dispute that state regulations impinging upon a fundamental right must be "closely fitted" to further a "compelling governmental interest." *Larson v. Valente*, 456 U.S. 228, 247 (1982).

Hartigan has presented for review, it cannot disregard the overwhelming facts that demonstrate substantial harms caused by parental involvement statutes and the failure of those statutes, even with a bypass, to achieve any legitimate state interest.

CONCLUSION

WHEREFORE, for the reasons set forth herein and in plaintiffs' initial brief, plaintiffs ask that this appeal be dismissed for want of jurisdiction. Should the appeal not be dismissed, the decision of the Seventh Circuit should be affirmed, or, in the alternative, the entire Illinois Parental Notice of Abortion Act should be declared unconstitutional.

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REPLY

BRIEF

No. 85-673

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and **RICHARD M. DALEY**, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and **ALLAN G. CHARLES, M.D.**, individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT NEIL F. HARTIGAN

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No. 85-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT NEIL F. HARTIGAN

I.

THIS APPEAL SATISFIES THE REQUIREMENTS OF 28 U.S.C. § 1254(2) AND THEREFORE MANDATORY JURISDICTION LIES TO REVIEW ALL OF THE ISSUES PRESENTED FOR REVIEW.

Like all mandatory jurisdiction statutes, § 1254(2) is confined to those cases which meet its precise requirements. *See California v. Cabazon Band of Mission Indians*, ____ U.S. ____, 107 S.Ct. 1083, 1087 n.4 (1987); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 292-93 (1982). Those requirements, however, should not be applied so as to frustrate the very objective of the statute. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 318-19 (1985); *see also Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 515 n.7 (1984).

Appellees propose an application of § 1254(2) that ignores this basic principle. Their persistent theme is that the Illinois Act is not complete and that in bringing this appeal, appellant seeks "advice on a nonexistent statutory scheme." (Plt. Supp. Br. 13; *see also* Plt. Supp. Br. 8-9, 10-11, 12-14).[1] Proceeding from this premise, appellees attempt to remove this case from the bounds of § 1254(2) by converting it into a controversy about the appropriate construction of state law (Plt. Supp. Br. 8-9, 10-11, 13) or a dispute among the various branches of state government.[2]

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[1] References to the Supplemental Brief of Plaintiffs-Appellees appear as (Plt. Supp. Br. ____). The Supplemental Brief of Appellant is cited as (Def. Supp. Br. ____). Citations to the briefs that were previously filed in this Court and to other relevant documents appear as designated in appellant's supplemental brief. (Def. Supp. Br. 7 n.1)

[2] Appellees maintain that these same concerns render this case inappropriate for review by certiorari. (Plt. Supp. Br. 14-18). Their characterization of this litigation and its impact upon the enforcement of the Act are no more forceful in that context. *See* pp. 8-10 *infra*.

(Plt. Supp. Br. 14-18) Despite these efforts, this case remains, at its core, a federal one, calling for the application of constitutional doctrine announced in this Court's decisions in *Planned Parenthood Association of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); and *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*).

A. The Decision That The Illinois Act Could Not Operate In Compliance With This Court's Directives Without Supplementary Rules Constitutes A Holding That § 5 Is Invalid As Repugnant To The Constitution.

While § 1254(2) unquestionably limits appeals to those cases in which a state statute is "held" invalid under federal law, 28 U.S.C. § 1254(2), that prerequisite may be satisfied even if the court of appeals does not declare the statute unconstitutional "in so many words." *Franchise Tax Board v. United States Postal Service*, 467 U.S. at 515 n.7. This is so because "[t]his Court's appellate jurisdiction does not turn on such semantic niceties." *Walters v. National Association of Radiation Survivors*, 473 U.S. at 317. Rather, it depends upon the character and effect of the decision measured against the policy of the grant of jurisdiction. *See California v. Grace Brethren Church*, 457 U.S. 393, 405-406 (1982) (jurisdiction proper under 28 U.S.C. § 1252 where no express holding of invalidity but federal officials nonetheless bound by decision); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 288-89 (1921) (writ of error proper to review state court judgment purportedly based on inapplicability of state statute but where real nature of decision was in favor of statute's constitutionality). Accordingly, so long as the court of appeals expressly rules on the state statute and that ruling is "a necessary predicate" to the relief awarded, § 1254(2) is satisfied. *Franchise Tax Board v. United States Postal*

Service, 467 U.S. at 515 n.7; *see also California v. Cabazon Band of Mission Indians*, 107 S.Ct. at 1087 n.4.

The injunction which prevents the operation of the Illinois Act was premised upon the Seventh Circuit's interpretation of constitutional requirements. Invoking the standard of *Ashcroft*, 462 U.S. at 491 n.16, the Court of Appeals observed that "[i]t is difficult to see how the absence of . . . rules provides the framework for a constitutionally sufficient means of expediting the appeal which would require upholding the provision without any further action by the Illinois Supreme Court." (J.S. App. 14; 763 F.2d at 1541). Also, it found that "the Illinois statute appears to fall short of the standard set forth in *Ashcroft* and *Bellotti II* which requires the statute to assure confidentiality." (J.S. App. 19; 763 F.2d at 1544) It rejected appellant's contention that existing Illinois Supreme Court rules supplied a constitutionally adequate avenue for prompt appellate review. (J.S. App. 16; 763 F.2d at 1542) Although the Court of Appeals invited the Illinois Supreme Court to rehabilitate the Act by promulgating additional rules, even that ruling was based upon an interpretation of federal cases. (Reply Br. 8 n.9)

In light of these pronouncements, resulting in an injunction which continues to restrain this statute, appellees cannot seriously assert that "[d]eference to state law led the Seventh Circuit to avoid a premature constitutional decision." (Plt. Supp. Br. 9) *See Thornburgh v. American College of Obstetricians & Gynecologists*, ____ U.S. ____, 106 S.Ct. 2169, 2206 (1986) (White, J., dissenting) (criticizing Third Circuit's decision to enjoin bypass procedures as misapplication of *Ashcroft*); *Zbaraz*, 763 F.2d at 1559-60 (J.S. App. 51-52) (Coffey, J., dissenting) (majority's decision is "in direct conflict with the Supreme Court's directive in *Ashcroft*"). That the Court of Appeals was cognizant of the limitations imposed upon the legislature by

the Illinois Constitution, Ill. Const. of 1970, art. VI, § 16, or that it read the Act to anticipate additional rules does not undermine the constitutional character of this decision. The decision "depends upon an antecedent ruling on federal law." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. at 293 & n.16. "[A]t the very least the [Court of Appeals] felt compelled by what it understood to be federal constitutional considerations to construe . . . [the Illinois] law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. at 292-93; *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.9 (1981). Regardless of the design or the directives of Illinois law, then, the Seventh Circuit ruled that this statute was facially infirm and that ruling was necessary to continue the injunction.

B. The Court Of Appeals Entered A Final Judgment Bringing This Case Within The Court's Mandatory Jurisdiction Under § 1254(2).

Appellant has demonstrated that the Court of Appeals definitively disposed of all of the constitutional issues presented to it. (Def. Br. 18-34; Def. Supp. Br. 9-15) He has shown that the policies which underlie the finality rule would be advanced, not frustrated, by immediate review. (Def. Br. 24-29, 31-33; Def. Supp. Br. 10-14) In addition, he has illustrated how the fundamental objective of § 1254(2) would be thwarted if this case were now returned to the lower federal courts. (Reply Br. 3-4; Def. Supp. Br. 6-9)

Nevertheless, appellees maintain that appellant "has demonstrated no reason for departing from the strict requirements of § 1254(2)." (Plt. Supp. Br. 12) Insisting upon a rigid application of the finality rule, they propose a course which is not justified by any of this Court's decisions: appellant must return to the District Court, wait until the Illinois Supreme Court restores the statute by enacting supplementary rules, litigate their constitutionality, and return to this Court to raise anew all of the questions that are currently before it. (Plt. Supp. Br. 10-12)

In this pre-enforcement challenge, the remand resulted when the Court of Appeals rejected appellant's constitutional arguments and invited the State Supreme Court to supplement the Act. This ruling will not be changed. It is contingent upon the promulgation of new rules. Since those rules do not exist, a restrictive application of the finality rule could "practically defeat the right to any review at all," *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940), placing this case within a category calling for immediate review. (Plt. Supp. Br. 10) Furthermore, if the Constitution does not mandate supplementary rules before the Act may go into effect, both of the lower federal courts may be spared another round of litigation and the interests of judicial efficiency will be served.[3] *See Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989, 997 n.7 (1987); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977); *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976). Even if additional rules are constitutionally necessary, however, a future appeal is not inevitable. It will depend upon appellees' decision to challenge them.[4]

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[3] The remand implicates more than efficient management of federal litigation. It requires the State Supreme Court to expend efforts to restore the Act. In these circumstances, the comity concerns which underpin § 1254(2) militate in favor of immediate review. (*See* Def. Br. 28-29; Reply Br. 3-5; Def. Supp. Br. 6-9)

[4] That appellees may some day wish to challenge the Illinois Act as applied is not relevant to the jurisdictional question presented here. (Reply Br. 3 n.3) In this regard, it is significant that when discussing those evidentiary matters that might arise on remand, appellees point to such factors as the delay and trauma attendant

(Footnote continued on following page)

In any event, constitutional adjudication cannot be avoided. The Seventh Circuit struck down the waiting period and § 7(a). These rulings are not encompassed in the remand and will remain in dispute. *See Pennsylvania v. Ritchie*, 107 S.Ct. at 997 & n.7; *City of New Orleans v. Dukes*, 427 U.S. at 302; *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n.1 (1971). Dismissal will thus necessitate a future appeal in which these same matters will be litigated.[5] In these circumstances, the very policies which appellees use to support their position dictate an application of the finality rule contrary to the one they urge. (Plt. Supp. Br. 10)

[4] *continued*
to the bypass procedures, the potential for invading the minor's privacy, and the "consequences of the compelled notice requirement itself." (Plt. Supp. Br. 19) Most of these factors will be susceptible of proof only after the State is permitted the opportunity to enforce the Act, an event which has been foreclosed by this already lengthy litigation. Evidence concerning the consequences of the notice requirement will have no place in the proceedings on remand. Not only has this Court held that that requirement is constitutionally permissible, *Matheson*, 450 U.S. at 409-10, but the remand order itself is limited to the constitutional adequacy of any rules promulgated by the Illinois Supreme Court.

[5] There is no merit to appellees' claim that review of these issues "would be premature and purely advisory prior to the promulgation of rules." (Plt. Supp. Br. 11) It rests upon the erroneous position that the entire case is not properly before this Court.

If appellees mean to suggest that the Illinois Supreme Court will not enact rules if this Court decides that they are constitutionally necessary, the suggestion is without foundation. Appellant has elsewhere detailed the effect that this federal litigation has had upon further State Court action. (Def. Br. 28-30; Reply Br. 11 & n.11) The Illinois Court's reluctance to promulgate rules, which are not yet necessary and which may be guided by this Court's decision, can hardly be attributed to a "stalemate" among the branches of State government. Indeed, the Illinois Supreme Court is not alone in following this course of action. *See* Brief of *Amicus Curiae* State of Nevada at App. 5 (letter of Chief Justice of Supreme Court of Nevada to Attorney General declining to enact rules before federal appeal completed).

Moreover, this case does not, as appellees' suggest, raise questions of state law which prevent the exercise of jurisdiction under § 1254(2). (Plt. Supp. Br. 10-11) Section 5 does not mandate additional rules as a matter of state law. Rather, it provides that an appeal is permitted "as the [Illinois] Supreme Court provides by rule." § 5(f) It asks that Court "to promulgate any rules and regulations *necessary* to ensure that proceedings under this Act are handled in an expeditious and confidential manner." § 5(g) (emphasis added). Under State law, a prompt appeal is currently permitted "as the [Illinois] Supreme Court provides by" Rules 303 and 311. Ill. Rev. Stat. ch. 110, ¶¶ 303, 311 (1985). If in order to regulate this class of appeals, the Illinois Court considers that more specific rules are "necessary," it may enact them.

The pivotal question presented to this Court is whether the Constitution requires more than this in order for the Act to survive a facial attack. If it does not, no revision of the Act will be necessary. The State legislature may provide procedures for Illinois minors that are more exacting than those the Constitution requires. *See Mills v. Rogers*, 457 U.S. 291, 300 (1982); *Bishop v. Wood*, 426 U.S. 341, 349 n.14 (1976). Likewise, the State Court may provide additional rules guided solely by the particular needs of its own judicial system. Consequently, the intention of the Illinois legislature will not be undermined if this Court rules on the constitutional question. Rather, a decision of this Court would clarify the need for further State Court action.

In short, appellant does not seek to enforce a statute that is not yet in existence. (Plt. Supp. Br. 13) Instead, he seeks reversal of a decision which prevents operation of the Illinois Act because of an erroneous interpretation of constitutional principles. This is precisely the kind of decision that is reviewable under § 1254(2).

II.

EVEN IF THIS CASE DOES NOT COME WITHIN THIS COURT'S MANDATORY JURISDICTION UNDER § 1254(2), THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO REVIEW ALL OF THE QUESTIONS PRESENTED.

In his initial brief, appellant requested the Court to grant a writ of certiorari if appellate jurisdiction could not be founded on § 1254(2). (Def. Br. 34-36) The appropriateness of exercising discretionary jurisdiction is enhanced now that the parties have fully briefed all of the constitutional issues. These issues are of profound concern to many states which, like Illinois, desire to ensure parental participation in the abortion decision of their minor citizens.[6] Despite appellees' assertions, moreover, there are no constitutional or prudential impediments to discretionary jurisdiction under § 1254(1). (Plt. Supp. Br. 12-20)

The implementation of the Illinois Act has been circumvented, at appellees' insistence, for almost four years by federal court action. (J.A. 1) In seeking review of the decision which brought about this status, appellant has not at-

[6] A number of cases involving constitutional challenges to other states' parental notice provisions are currently pending in the lower federal courts. Their disposition could be affected by the Court's decision in this case. *See, e.g., Hodgson v. Minnesota*, Nos. 86-5423, 86-5431, slip op. (8th Cir. Aug. 27, 1987), *petition for reh'g filed* (Sept. 10, 1987) (holding Minnesota law unconstitutional as applied); *Glick v. McKay*, No. 85-2335 (9th Cir. order vacating submission pending decision in *Hartigan v. Zbaraz* entered March 13, 1987); *Akron Center for Reproductive Health v. Slaby*, No. 86-3664 (6th Cir. appeal docketed July 18, 1986); *Planned Parenthood Association v. Harris*, No. 87-1405A, slip op. at 56-57 (N.D. Ga. Sept. 8, 1987) (preliminary injunction against Georgia statute and further proceedings stayed pending disposition in *Hartigan v. Zbaraz*).

In addition, seven states have joined Illinois in urging reversal of the Seventh Circuit's decision. *See* Brief of *Amici Curiae* States of Ohio, Arizona, Indiana, Minnesota, Missouri, and Utah; Brief of *Amicus Curiae* State of Nevada.

tempted to revise the Illinois statute (Plt. Supp. Br. 12-14) or "bludgeon into action other branches of Illinois State Government." (Plt. Supp. Br. 14) On the contrary, he has endeavored, on behalf of the State of Illinois, to effectuate the intent of its citizens by lifting the federal court injunction which prevents the statute from functioning.

In route to this goal, he proposed two constitutional grounds for vacating the injunction: § 5 is facially adequate (Def. Supp. Br. 19-28) and bypass procedures need not accompany a notice provision.[7] (Def. Supp. Br. 28-33) The Court of Appeals ruled on both grounds. (J.S. App. 11, 14, 19; 763 F.2d at 1539, 1541, 1544) Each one presents a substantial federal question whose resolution could effectively alter the rights and obligations of the parties.[8] *See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 201-202 (1983); *Pennsylvania v. West Virginia*, 262 U.S.

[7] Appellant did not exceed the bounds of the questions "fairly included" in the jurisdictional statement in raising this question. Sup. Ct. R. 15.1(a). *See Pulliam v. Allen*, 466 U.S. 522, 528 & n.5 (1984); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980). He requested the Court to entertain the issue in the event that it found § 5 wanting under *Ashcroft* and intended to continue the injunction or invalidate the Act. In that context, adjudication of that issue is a "predicate to an intelligent resolution" of the second question presented in the jurisdictional statement. *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6 (1980) (quoting *Vance v. Terrazas*, 444 U.S. at 258-59 n.5).

[8] This Court's decision in *Thornburgh*, 106 S.Ct. at 2177, does not mandate dismissal. Unlike the situation presented here, the Pennsylvania Supreme Court issued rules while the case was pending in this Court. In *Thornburgh*, there were additional questions remaining in the District Court which required factual development. Here, the remand only encompasses an evaluation of rules that are not in existence. Moreover, the Pennsylvania statute required parental consent. Under this Court's decisions, a bypass procedure was clearly obligatory. Whether a similar obligation attaches to a notice provision is one of the questions presented in this case.

553, 591 (1923). Specifically, a favorable adjudication resting on either basis would remove the restraint which precludes the operation of this statute.

It is true that neither of the requested rulings would change Illinois law. But it is quite a different matter to suggest, as appellees do, that a decision of this Court could not affect the *status* of that law. (Plt. Supp. Br. 14) Indeed, it is somewhat convoluted for the party who obtained the federal injunction initially to argue that review cannot be had to rid the State of the very harm of which it complains, because State laws may furnish or contemplate more than the constitutional minimal.

Similarly, to portray this litigation as "a stalemate" among the branches of State government is to contort its history. Appellant's efforts to save this statute from federal nullification were designed to remove the federal barrier to its enforcement so that each branch of Illinois government could fulfill the role assigned to it under the State Constitution. Thus, the "important issues of federalism" (Plt. Supp. Br. 14) which are present in this case warrant immediate, not delayed, review. (Def. Br. 27-29, 36; Reply Br. 3-5; Def. Supp. Br. 8-9, 14)

"The aim of the Supreme Court, to be allowed to confine its adjudications to issues of constitutionality and other matters of essentially national importance" is in no way undermined by assuming jurisdiction in this case. F. Frankfurter & J. Landis, THE BUSINESS OF THE SUPREME COURT 280 (1928). Whether that jurisdiction is premised upon § 1254(1) or (2), this Court is authorized to entertain all of the questions that the Court of Appeals decided.

III.

THE JUDICIAL ALTERNATIVE TO PARENTAL NOTIFICATION PROVIDES THE SAFEGUARDS NECESSARY TO WITHSTAND THIS PRE-ENFORCEMENT FACIAL CHALLENGE.

The Illinois Act has not yet been permitted to operate. Thus, no minor has invoked § 5's procedures and Illinois courts have not been accorded an opportunity to apply them consistently with this Court's teachings. In spite of this posture, appellees maintain that "a young woman's abortion right *may* be seriously at risk". (Plt. Supp. Br. 21-22, 30) (emphasis added)

Appellees' insistence upon detailed rules which guarantee a constitutional application of the Illinois Act in each case, however, is inappropriate in this setting and directly contrary to the requirements that must be satisfied under *Bellotti II* and *Ashcroft*. (Def. Supp. Br. 19-22) A constitutionally adequate "framework" rather than a detailed plan of action is what is necessary to avert this facial challenge. *Ashcroft*, 462 U.S. at 491 n.16. In addition, it is improper to presume, as appellees do, that Illinois courts will place obstacles in the path of a minor child who uses the judicial alternative. *Id.*; *Bellotti II*, 443 U.S. at 645 n.25.

A. Appellees' Conjectures That A Prompt Appeal Will Not Be Available Do Not Justify Continuation Of The Injunction.

Appellees depart from the plain language of the Illinois Act when they suggest that a speedy appeal may be defeated by the intervention of additional parties. (Plt. Supp. Br. 22-25) Section 5(f) restricts the right to take an appeal "to any minor or incompetent to whom the circuit court denies a waiver of notification." This provision neither contemplates nor permits participation in the ap-

peal by a party who would thwart the minor's ability to move for an expedited appeal.[9]

The absence of any other parties should also allay the concern that the appellate court will postpone ruling upon the minor's motion to expedite until the time for filing objections is exhausted under Illinois Supreme Court Rule 361. Ill. Rev. Stat. ch. 110A, ¶ 361 (1985). (Plt. Supp. Br. 23) That rule is geared to the usual case in which an opposing party is present and may wish to object to a motion. Since that feature does not exist in this class of appeals, the appellate court would have no reason to delay its ruling. Moreover, Rule 361(d) itself permits the court to disregard the time limitations "in extraordinary circumstances." *Id.* Surely, these appeals which entail a single party whose rights depend upon swift action would fall within that exception.[10]

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[9] In addition to the unambiguous language of the Act, the legislative history supports this construction. An earlier version of the bill, which ultimately resulted in this enactment, allowed the guardian ad litem as well as the minor to take an appeal. (Def.-App. Reply Br. to the Seventh Cir. at A-5) By amending the bill, the legislature made clear its intention to restrict the right of an appeal to the minor alone.

Moreover, the role of the guardian in juvenile delinquency proceedings is entirely distinct from the one played in this context. (Plt. Supp. Br. 22 n.16) Here, the guardian is appointed by the court to prosecute the case on the minor's behalf. In this situation, his duties are "to examine into the case, and determine what the rights of his wards are, and what defense their interest demands, and to make such defense as the exercise of care and prudence will dictate." *Rom v. Gephart*, 30 Ill.App.2d 199, 208, 173 N.E.2d 828, 833 (1961) (quoting *Stunz v. Stunz*, 131 Ill. 210, 221, 23 N.E. 407, 409 (1890)). In short, the guardian ad litem's interests are coextensive with those of the minor. *See In re Marriage of Omelson*, 112 Ill.App.3d 725, 730, 445 N.E.2d 951, 955 (1983).

[10] In light of these factors, buttressed by this Court's pronouncements, there is no reason to assume that the Illinois Appellate

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Appellees' unsupported assertion that the appellate court may disregard the terms of Rule 311 and require a completed record is unjustified since Rule 311 has never been applied in this context. *See Ashcroft*, 462 U.S. at 491 n.16; *Bellotti II*, 443 U.S. at 645 & n.25. Furthermore, the appellate court need not exclusively rely upon the minor's representation of the facts. It will also have available the "written and specific factual and legal conclusions" which the circuit court is obliged to make within forty-eight hours of the filing of the petition.[11] § 5(c), (e).

Without regard to the comparative length of the trial proceedings or the relative complexity of the issues, appellees point to two Illinois cases and speculate that "prolonged appellate delays" will necessarily accompany this class of appeals.[12] Such speculation is yet another invita-

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[10] *continued*
Court will blindly adhere to rules of practice so as to interpose delays. (Plt. Supp. Br. 23 n.17) As an extra guarantee that the motion will be heard promptly, the minor's attorney could style it as an emergency motion to expedite. In so doing, the appellate court will be apprised of the need for an immediate decision on the motion as well as on the substance of the appeal.

[11] The minor may order a transcript of the proceedings immediately after the hearing and attach it to her Rule 311 motion to support her statement of facts. As appellees recognize, the brevity of the proceedings should prevent delays in preparing the transcript. (Plt. Supp. Br. 24 n.19) It may very well be that the circuit court itself will ask that a transcript be prepared in order to make the requisite findings.

[12] The Appellate Court's decision in *In re Estate of D.W.*, 134 Ill.App.3d 788, 789-90, 481 N.E.2d 355, 356 (1985), indicates that three witnesses testified during the course of a one-day hearing and that the circuit court entered its order the following day. Despite the fact that the proceedings were somewhat more protracted than can be expected in § 5 proceedings, the Appellate Court reached its decision within eleven days. In this regard, it must be borne in mind that this Court upheld the Missouri statute in *Ashcroft* in the face of uncontradicted testimony that the procedure might produce delays of thirteen days or more. *See* Peti-

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tion to this Court to evaluate the possible application of the Illinois Act. What is more, it is a call to presume that the Illinois Appellate Court will not take seriously its duty to abide by established constitutional law. In both respects, the argument is foreclosed by *Ashcroft* and *Bellotti II*.

B. The Injunction Should Be Lifted Because The Act Sufficiently Protects Against Disclosure Of The Minor's Identity.

The attack on § 5's protection of the minor's anonymity is premised solely upon that provision's failure to track the statute in *Ashcroft* which permitted the young woman to use her initials on the waiver petition. (Plt. Supp. Br. 28-31) As appellant has shown, Illinois follows this practice. Therefore, this factor is not sufficient to prevent the Illinois Act from operating within constitutional bounds. (Def. Supp. Br. 26-28) In fact, the explicit provisions of this statute exceed the assurances of confidentiality favorably noted in *Ashcroft* and *Bellotti II*. (Def. Supp. Br. 26-27)

If the Illinois Act were permitted to take effect, it may be that as a practical matter a young woman who invokes the alternative procedure will be instructed before she goes to court about the mechanics of filing her petition. Family planning agencies and abortion clinics have provided such assistance in other states. *See* Donovan, *Judging Teenagers: How Minor's Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 259, 260-61 (1983). Until that time, however, the only legitimate inquiry is whether on its face this statute supplies assurances that the minor's identity will not be disclosed. Section 5(c) and (e) in conjunction with established practice satisfy this constitutional standard. (Def. Supp. Br. 27-28)

[12] *continued*
tioner's Reply Brief at 7-8, *Ashcroft*, 462 U.S. 476. Furthermore, under § 5(c) the circuit court must proceed with greater dispatch than it did in *In re Estate of D.W.*

IV.

APPELLEES' "NEW" EVIDENCE DOES NOT ESTABLISH THE NEED FOR A JUDICIAL ALTERNATIVE TO PARENTAL NOTIFICATION OR DIMINISH THE INTERESTS PROTECTED BY MANDATORY NOTIFICATION.

Only as an alternative to continuing the injunction or invalidating the Act, did appellant ask the Court to consider the additional question whether a judicial alternative must accompany a parental notice requirement. (Def. Supp. Br. 28-33) Thus, the Court need not resolve this issue in order to vacate the injunction. However, if it chooses to do so, contrary to appellees' argument, such a resolution is not barred by the constitutional fact doctrine. Nor should it be guided by evidence which emerged in a distinct context and in a different case.[13]

The fundamental question presented is whether a state may "utilize, for purposes of implementing a parental-notice requirement, a yardstick based upon the chronological age of unmarried pregnant women." *Matheson*, 450

[13] Appellees' attempt to obtain review of the decision in *Hodgson v. Minnesota*, 648 F.Supp. 756 (D. Minn. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1333 (1987), *aff'd*, Nos. 86-5423, 86-5431, slip op. (8th Cir. Aug. 27, 1987), *petition for reh'g filed* (Sept. 10, 1987), in this case is unfair and inappropriate. The record in that case is not before this Court. Consequently, neither appellant nor the Court will have an opportunity to assess the propriety of the District Court's factual findings or to refute in any meaningful way the conclusions it drew. Unlike Minnesota, Illinois has not had an opportunity to implement its statute. Even if the complete record in *Hodgson* were available, then, the constitutionality of the Illinois Act would be determined by conditions existing in Minnesota without any evidence that the same conditions will arise in Illinois. In addition, Illinois would be bound by the litigation decisions made on behalf of another state.

U.S. at 425 (Stevens, J., concurring in judgment). This question was not finally put to rest in *Bellotti II* or subsequent decisions. (Def. Supp. Br. 29) Moreover, the presumed desirability of parental involvement is not a "fact" in the ordinary sense of that term. It does not draw so much from historic or objective data, but "calls for striking a balance between incommensurate interests." *Oregon v. Mitchell*, 400 U.S. 112, 206 (1970) (Harlan, J., concurring in part and dissenting in part). That is, it depends upon a judgment about the appropriate allocation of private interests as well as the power of the state to prefer one set of interests over the other. *Id.*

To some extent that balance is pre-ordained, for

> [t]he law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Parham v. J.R., 442 U.S. 584, 602 (1979); *see also Matheson*, 450 U.S. at 423 n.1 (Stevens, J., concurring in judgment). In addition, even in the abortion context, this Court has drawn a distinction between the state's attempt "to impose its will by force of law" and "the State's power to encourage actions deemed to be in the public interest." *Maher v. Roe*, 432 U.S. 464, 475 (1977); *see also City of Akron*, 462 U.S. at 466 (O'Connor, J., dissenting) (state not required to enact laws which encourage or facilitate abortions).

Absent mandatory parental notification, it is likely that more than one-half of all young women who seek abortions will not consult with their parents. R. Mnookin, IN THE INTERESTS OF CHILDREN 158 (1985). Consequently, regardless of their age, level of maturity, and experience, a

substantial number of these young women will be allowed to make this decision alone. Apart from the rights of their parents which are fundamentally implicated, the State itself has an interest and an obligation to protect its young citizens from harm.

According to appellees, in this context, the State must curtail that interest by providing bypass procedures, which even they concede impose burdens of their own, or abandon it altogether. (Plt. Br. 31-39) Implicit in this argument is the notion that the benefits and burdens of mandatory parental consultation are susceptible of hard proof and concrete resolution. Correlatively, it assumes that, when regulating in this area, the State must draw lines with unerring accuracy. Neither proposition is well founded.

"[H]ow good . . . parental supervision and advice is, and how well it is respected by the minor when she is forced to consult her parents," Mnookin, *supra* p. 16, at 159, are questions whose resolution entails intangible variables that cannot be measured easily.[14] Similarly, the motivations which induce a young woman to refrain from consulting with her parents before obtaining an abortion are multifarious. Whether they are justified in most instances is

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[14] It is generally agreed that the abortion decision is especially difficult for adolescents. Adler & Dolcini, *Psychological Issues In Abortion For Adolescents*, in ADOLESCENT ABORTION: PSYCHOLOGICAL AND LEGAL ISSUES 74, 78, 84-85 (G. Melton, ed. 1986) [hereinafter Adler]; Klerman, Bracken, Jekel & Bracken, *The Delivery-Abortion Decision Among Adolescents*, in PREGNANCY IN ADOLESCENCE: NEEDS, PROBLEMS, AND MANAGEMENT 219, 226-27 (I. Stuart & C. Wells, eds. 1982) Most professionals recognize that the help and support of persons who are significant to the child, including family members, can alleviate some of the trauma attendant to the abortion and the acceptance of that decision later. Adler, *supra*, at 77-79; Horowitz, *Adolescent Mourning Reactions To Infant And Fetal Loss*, 1978 Soc. Casework 551, 553-54. This assistance is especially important for younger children. Mnookin, *supra* p. 16, at 159.

unknown and perhaps unknowable.[15] Consequently, "we face a complex problem with many hard questions and few easy answers." *City of Akron*, 462 U.S. at 465 (O'Connor, J., dissenting) (quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973)).

In light of the nature of this problem, some latitude is warranted when the state regulates in this area. *City of Akron*, 462 U.S. at 465 (O'Connor, J., dissenting). A legislative judgment that parental consultation is largely beneficial rests upon well-established presumptions about the maturity of children and the role parents play in safeguarding their welfare. In addition, it is guided by the realistic assessment that "every parent-child relationship

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[15] Appellees report that "compelled notice produces great distress for the young woman, particularly if she fears her parents are, 'likely to react with psychological, sexual or physical violence.'" (Plt. Supp. Br. 33) (quoting *Hodgson*, 648 F.Supp. at 764) However, there are no hard facts which indicate that most parents will react against the best interests of their children. *See Matheson*, 450 U.S. at 423 (Stevens, J., concurring in judgment). In the overwhelming majority of cases, children choose not to tell their parents for fear of hurting or disappointing them. Mnookin, *supra* p. 16, at 158-59; Clary, *Minor Women Obtaining Abortions: A Study Of Parental Notification In A Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982); Rosen, Benson & Stack, *Help Or Hindrance: Parental Impact On Pregnant Teenagers' Resolution Decisions*, 1982 Fam. Rel. 271, 274 [hereinafter Rosen]. Even in those limited instances in which the child expresses fear of negative parental reaction, their fears are usually exaggerated. Mnookin, *supra* p. 16, at 158; Brief for Appellant-Minnesota at 11, *Hodgson*, Nos. 86-5423, 86-5431 slip op. (8th Cir. Aug. 27, 1987) (citing testimony of experts, including Dr. Hodgson). For the most part, when parents are told of their daughter's plight, they offer her support and guidance. *See* Clary, *supra*, at 284; Rosen, *supra*, at 275-76. Moreover, the distress which is caused by the revelation of the young woman's pregnancy and decision to abort cannot be viewed in a vacuum. It must necessarily be weighed against the benefits that may result from parental support.

is [n]either (a) so perfect that communication and accord will take place routinely [n]or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will . . . [act] arbitrarily to further a selfish interest rather than the child's interest." *Matheson*, 450 U.S. at 423 (Stevens, J., concurring in judgment) (quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 103-104 (1976) (Stevens, J., concurring in part and dissenting in part). In making these assessments, the State is not required "to fine-tune its statutes so as to encourage or facilitate abortions." *Matheson*, 450 U.S. at 413. Rather, it may select a "yardstick" which provides a close but imperfect measure of its interests. *Id.* at 413; *see also id.* at 425 (Stevens, J., concurring in judgment). Accordingly, should this Court determine that § 5 does not provide a judicial alternative which meets the standards of *Ashcroft* and *Bellotti II*, it should nevertheless vacate the injunction.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in appellant's earlier briefs, this Court has jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit under 28 U.S.C. § 1254(2) or § 1254(1). Appellant requests this Court to reverse the judgment holding unconstitutional the waiting period and

§ 7(a), to dissolve the injunction, and to uphold the Illinois Parental Notice of Abortion Act in its entirety.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 85-673

IN THE

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Appellants,

v.

DAVID ZBARAZ, M.D., et al.,
Appellees.

On Appeal From The United States Court of Appeals For The Seventh Circuit

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BRIEF OF CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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**On Appeal From The United States Court Of Appeals
For the Seventh Circuit**

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

Concerned Women for America (CWA) is a national, nonprofit women's organization with over 560,000 members. CWA works through lobbying and litigation to promote religious liberty and traditional moral values in the United States. CWA attorneys have appeared before this Court, see *Larry Witters* v. *Washington Department of*

Services for the Blind, 474 U.S. ___, 88 L.Ed.2d 846 (1986).

At its annual convention in September, 1984, the members of CWA passed their "Basic Concerns for Public Policy." One of those Basic Concerns is as follows:

> III. We call for a public policy which protects the inherent, God-given rights of parents to direct the upbringing of their children in matters of education, religion, nurturing, and other areas of traditional parental responsibility. We call for the passage of the Parents Rights Amendment to achieve this end.

PRELIMINARY COMMENTS

This Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), established that a woman's right to abortion is a "fundamental" right. Therefore, state regulation of that right to abortion may be justified only by a "compelling state interest," and legislative enactments must be "narrowly drawn" to express only the legitimate state interests at stake.

The State of Illinois has attempted to protect a minor's right to receive an abortion, and also to protect parental rights to oversee the upbringing of their children, by passing the Illinois Parental Notice of Abortion Act under consideration in this case. Illinois is seeking to require minor, unemancipated, unmarried, female children (some as young as 12 or under) to notify their parents and then wait 24 hours before carrying out their decision to have an abortion. The law also provides an alternative court procedure for the minor girl. This legislation does not give parents a *veto* of the abortion procedure which was previously held by this Court to be unconstitutional in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

The Illinois law attempts to protect parental rights, as well as those of minor girls seeking abortions. This Court, in *Bellotti* v. *Baird*, 443 U.S. 622 (1979), and individual Justices in their various concurring and dissenting opinions have strongly supported the concept of parental rights which we argue for in this brief. Concerned Women for America urges this Court to affirm the constitutionality of the Illinois statute.

ARGUMENT

I

MERE PARENTAL NOTIFICATION OF ABORTION BY AN UNMARRIED MINOR IS NOT UNDULY BURDENSOME ON HER ABORTION RIGHT

The 7th Circuit Court of Appeals below approved the parental notice provision of the Illinois Statute under consideration. It is difficult to see how such a provision could be found unduly burdensome. The Illinois statute deals only with parental *notice*, while this Court has approved parental *consent* statutes which include satisfactory alternative court procedures.[1]

In *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), a case involving a parental *consent* statute, this Court ruled that a state could *not* constitutionally legislate a blanket, unreviewable power of parents to *veto* their daughter's abortion. However, in *H.L. etc.* v. *Matheson*, 450 U.S. 398 (1981), a case involving a parental *notice* statute, this Court approved a Utah law requiring a physician to give notice to parents, "if possible," prior to performing an abortion on their unemancipated, minor

---

[1] See *Bellotti* v. *Baird*, 443 U.S. 622 (1979) [*Bellotti II*], *City of Akron* v. *Akron Center*, 462 U.S. 416 (1983), and *Planned Parenthood* v. *Ashcroft*, 462 U.S. 476 (1983).

daughter, when the girl is living with and dependent upon said parents. The Court in *Matheson* stated (450 U.S. at 409):

> . . . a statute setting out a *mere requirement of parental notice* does not violate the constitutional rights of an immature, dependent minor. (Emphasis added.)

In *Bellotti II*, *supra*, the Court said that in formulating the Massachusetts abortion statue being considered, that State was attempting to reconcile the right of a woman to terminate her pregnancy under *Roe* v. *Wade*, *supra*, with the special interest of the State in encouraging an unmarried, pregnant, minor to seek the advice of her parents in making the important decision whether or not to bear a child.

The Court stated in *Bellotti II* that the question, in light of prior cases, was whether the Massachusetts statute provided for parental notice and consent in a manner that does not unduly burden the right to seek an abortion. In response to the allegation "that the mere requirement of parental notice [alone] constitutes such a burden," this Court stated as follows (443 U.S. at 640):

> . . . As stated . . . above, however, parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. [Footnote omitted.] It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns.

Note that in its response above to an allegation regarding parental *notice* only, this Court included reference to

parental *consent* as a qualification "that typically may be imposed by the state on a minor's right to make important decisions." The instant case is concerned with parental *notification* only, *not* consent.

In his concurring opinion, joined by Justice Powell, in the *Danforth* case, Justice Stewart stated as follows, including a footnote describing operations at an abortion clinic (428 U.S. at 91):

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. This is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.[2]

---

[2] The mode of operation of one such clinic is revealed by the record in *Bellotti* v. *Baird*, 428 U.S. 132 (1979) [*Bellotti I*], and accurately described by appellants in that case:

> 'The counseling . . . occurs entirely on the day the abortion is to be performed . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another. . . . The physician takes no part in this counseling process. . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . .
>
> The abortion itself takes five to seven minutes. . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the [clinic], the physician . . . may be performing abortions on many other adults and minors. . . . On busy days patients are scheduled in separate groups, consisting usually of five patients. . . . After the abortion [the physician] spends a brief period with the minor and others in the group in the recovery room. . . .'

Brief for Appellants in No. 75-73, P.T. 1975, pp. 43

Since this Court has affirmed parental *notice* in *Matheson*, and parental *consent* with adequate court procedures in three other cases, it should also uphold this law. The strictures of the Illinois law in question restrain a minor girl's right to an abortion in a much more modest fashion than laws previously upheld by this Court.

II

A 24-HOUR DELAY IS MINIMAL CONSIDERING THE NEEDS OF THE CHILD FOR PARENTAL CONSULTATION AND THE RESPONSIBILITIES AND RIGHTS OF THE PARENTS

The 24-hour delay provision of the Illinois statute is both a reasonable minimum for realistic parental consultation and an appropriate and constitutional State limitation on the right to abortion established by this Court. Aside from a real medical emergency situation, which is excepted from the notice requirements of Section 4 of the Illinois statute (see Section 6), a 24-hour waiting period after mere notification to parents of the abortion decision, is the least that should reasonably be expected considering the needs of a minor child at this crucial point in her life, and the inherent, moral, legal, and constitutional responsibilities and rights of her parents.

The Illinois law merely implements expert medical opinion that women should wait a period of time before having an abortion. The 7th Circuit and Appellees downplay the significance of the standards of the American College of Obstetricians and Gynecologists (ACOG) which recommend that "[p]rior to abortion the woman should have access to special counseling that explores options for the management of an unwanted pregnancy, examines the risks, and *allows sufficient time for reflection* prior to making an informed decision." (Emphasis

added.) (See 1982 ACOG Standard for Obstetric-Gynecologic Services at 54.) Does anyone believe this was intended to mean a 5-minute wait on the operating table after making a last-minute phone call to Mom and Dad? Why cannot reasonable standards such as this be incorporated into state laws covering abortion, one of the most significant choices a female child can make?

The 7th Circuit Court of Appeals and the Appellees also say that the 24-hour statutory waiting period, could, hypothetically, delay the minor's abortion for a week or more. This is nothing but imaginative supposition. It is really much more logical and sensible to say simply that the 24-hour waiting period results only in a 24-hour delay, which in most instances will make no difference at all in cost, health or convenience. If the 24-hour delay provided for by the Illinois statute should, in a few instances, result in further delays, they are completely justifiable in light of the needs of a minor female for parental consultation and the inherent, moral, legal and constitutional responsibilities, rights, and duties of her parents. And, as indicated above, real medical emergencies can be handled immediately.

The 7th Circuit also relied on the result in *City of Akron supra*, to strike down the 24 hour waiting period provision in the Illinois statute. That Court mistakenly assumed that the result in *Akron* must necessarily follow under the Illinois statute in this case. *City of Akron* can be distinguished from the instant case on at least three grounds.

First, *City of Akron* was a case of parental *consent* plus a 24-hour waiting period, whereas the Illinois statute seeks to establish mere parental *notification* plus a 24-hour waiting period. There is a difference. The City of

Akron ordinance requires that the *consent* form be *signed* by one parent after which the physician must certify that the 24-hours have elapsed before the abortion can begin. The State of Illinois statute in the instant case requires only 24-hour *notice* to both parents or to an available parent if both are not available. The term "actual notice" in the statute is defined as merely "the giving of notice directly, in person or by telephone."

Another distinction between *Akron* and the instant case is that the Akron ordinance covers only a pregnant "woman," whereas the Illinois statute covers *minors only.* This Court's decisions show that this distinction will necessarily result in a different treatment of the issues involved in the two categories of cases.

For example, in *Bellotti II, supra,* this Court stated (443 U.S. at 641, Footnote 21):

> . . . Those cases [*Roe* and *Doe*] . . . involved adult women presumably capable of selecting and obtaining a competent physician. In this case, however, we are concerned only with minors who, according to the record, may range in age from children of 12 years to 17-year-old teenagers. Even the latter are less likely than adults to know or be able to recognize ethical, qualified physicians, or to have the means to engage such professionals. Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent and unethical.

This distinction between the terms, "minors" and "women" in the Akron ordinance and the Illinois law also point to a third major distinction between this Court's decision in *Akron,* and the case at bar. The ordinance in *Akron* was justified by the U.S. District Court which upheld the Akron ordinance, as giving a "woman" sufficient time for reflection and consideration of the facts involved in the prospective abortion, whereas the Illinois statute is justified by the State of Illinois entirely on the basis of its providing at least a minimum time for parent and child to have a realistic consultation prior to the actual operation. The Akron ordinance was based on the needs of the "woman" whereas Illinois has clearly centered its statutory plan on the needs of the minor child and the responsibilities, rights, and duties of the parents of minor children.

The Illinois statute involved here was passed by the Illinois legislature (over the Illinois Governor's veto) for the express purpose of furthering specific, important, and compelling state interests as follows:

> 81-62. LEGISLATIVE PURPOSE AND FINDINGS
>
> Sec. 2. Legislative purpose and findings. (a) It is the intent of the legislature in enacting this parental notice provision to further the important and compelling State interests of: 1.) protecting minors against their own immaturity, 2.) fostering the family structure and preserving it as a viable social unit, and 3.) protecting the rights of parents to rear children who are members of their household.
>
> (b) The legislature finds as fact that: 1.) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2.) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3.) the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related, 4.) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5.) parents who

> are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interest of the minor. (See pp. 93 and 94 of Appellant's Appendix to the Jurisdictional Statement).

The Illinois statute helps protect minor girls faced with the significant decision of whether to abort their child or not. Although these girls are physically mature enough to get pregnant, they may not be emotionally mature enough to make a decision about a possible abortion. The two maturities are not necessarily related.

In *Bellotti II*, the Court, 443 U.S. at 633 and 634, "recognized that the status of minors under the law is unique in many respects," and also recognized "The unique role in our society of the family, the institution by which we inculcate and pass down many of our most cherished values, moral and cultural.'" Citing *Moore* v. *East Cleveland*, 431 U.S. 494, 503-504 (1977). This Court further recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults, namely (1) "the peculiar vulnerability of children," (2) "their inability to make critical decisions in an informed, mature manner," and (3) "the importance of the parental role in childrearing" (443 U.S. at 634). The Court next presented (443 U.S. at 634-639) a discussion of why these three reasons support the conclusion that the constitutional rights of children cannot be equated with those of adults.

In its discussion of reason 3, above, "the importance of the parental role in childrearing," this Court said, as follows (443 U.S. at 637):

> . . . the guiding role of parents in the upbringing of their children justifies limitations on the freedom of

> minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors.

Parental oversight of minor children does not shackle the individual liberty of children in some constitutionally impermissible way. As this Court said in *Bellotti II* (443 U.S. at 638):

> Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding.

The special relationship between parents and their children, plus the children's need for parental counseling, plus inherent, moral, legal and constitutional responsibilities and rights of parents, more than justify the parental notice, plus the 24-hour waiting period provision in the Illinois statute.

CONCLUSION

The Illinois law attempts in a constitutional way to uphold parental rights to oversee the upbringing of their children, to protect minor girls, yet maintain their right to abortion. This Court should uphold the Illinois law.

December 19, 1986

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AMICUS CURIAE

BRIEF

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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DAVID ZBARAZ, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civil education, youth activities, and communications. When permitted by court rules and practice,

the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States. Values of particular importance to the Church are the protection of family life and the protection of unborn life. Both are implicated in the case at bar.

The case at bar offers this Court an important opportunity to affirm and strengthen its historic commitment to family life. Permissive abortion of an adolescent's child strikes at the heart of that commitment. For a pregnant dependent adolescent, no decision is potentially more important or trying. If the family is to retain any vitality, its members must, at a minimum, be entitled to reflect upon and discuss this decision to help each other understand its import and consequences. In this case, Illinois has chosen to protect family integrity by allowing parents a chance—twenty-four hours—to so reflect with their daughter. To rule, as the court of appeals did below, that a state may not shield the family for this brief time is to deny that integrity and, ultimately, to undermine familial relationships. This *amicus* concludes that the Court should rule that, whatever the scope of a minor's "right" to seek an abortion, family integrity is a substantial interest worthy of judicial deference here.

Through their counsel, the parties have consented to the appearance of this *amicus*.

SUMMARY OF ARGUMENT

The American family stands as the basic unit of our society. Society itself owes much of its stability to the strength of the family and has a vital interest in preserving family integrity. "The intangible fibers that connect parent and child . . . are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility." *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). Indeed, "the Constitution protects the sanctity of the family

precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality).

Abortion challenges that institution and its values in fundamental ways. Under the abortion decisions of this Court, one member of the household may dictate to all the others whether new life—plainly a member of the family—may be allowed to be born. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 70-71, 74-75 (1976). When the person making that decision is an adolescent, the implications are especially serious. The adolescent making such a decision needs to be guided by knowledgeable and caring persons, not abortion clinic employees, if she is to appreciate meaningfully the import and consequences of her actions. *Id.* at 91 (Stewart, J., concurring). The persons she may and should look to are her parents or, in their absence, guardians. *Bellotti v. Baird (II)*, 443 U.S. 622, 640 (1979) (plurality).

This Court has recognized a need for parental consultation and consent when the person seeking an abortion is a dependent, immature adolescent. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 576, 490-91, 505 (1983); *H.L. Matheson*, 450 U.S. 398, 409-411 (1981). The process of intra-family discussion and decisionmaking is advanced by statutes requiring that such an adolescent pause for a brief time, facilitating consultation with her parents. That legislative judgment, which reflects a proper balance of the state, family and individual interests, should not be lightly set aside, and then only when it is "clearly incompatible" with supervening constitutional mandate. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 530-31 (1871); *Otis v. Parker*, 187 U.S. 606, 608 (1903). The legitimacy of such a legislative judgment, presented in this case, cannot be seriously doubted.

The Illinois Parental Notice of Abortion Act provides a mandatory waiting period—twenty-four hours—for a dependent, immature minor seeking abortion after notice of her intention is given to her parents. Ill. Rev. Stat., ch. 38, ¶ 84-64(a). A principal purpose identified by the legislature in enacting the waiting period is to foster and preserve the family as a viable social unit. *Id.* ¶ 84-62(a)(2). During the waiting period, parents may consult with and advise their daughter about the intended abortion and its consequences. Presumptively, parents will act out of genuine concern to advance the welfare of their child. Although "experience and reality may rebut what the law accepts as a starting point. . . . ," this is "hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interest." *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979); *see H.L. v. Matheson*, 450 U.S. at 411-12. Whether the parents agree or disagree with her decision is beside the point At least the family is entitled to the time and the private space for a discussion.

These considerations were ignored by the majority of the court of appeals invalidating the Illinois law. The majority asserted that any interest the state had was preserved by mere notice. Even a telephone call that an abortion would be performed imminently at some remote location would suffice under the majority opinion. This drew a vigorous and pointed dissent. *Zbaraz v. Hartigan*, 763 F.2d 1532, *compare* 1538 (majority) with 1553 (dissent) (7th Cir. 1985), *jurisdiction postponed*, 107 S.Ct. 267 (1986) (No. 85-673). The majority did not cite, much less discuss, the separate interest in preserving family integrity identified by the legislature. Rather, it assumed that a waiting period in these circumstances would not advance the family relationship. 763 F.2d at 1537-38. Even if that assumption were arguably plausible, it is contrary to the teaching of this Court that parents, even in families under stress, have a "vital interest in preventing the irretrievable destruction of their family life." *Santosky v. Kramer*, 455 U.S. 745, 753 (1983). That vital interest is properly protected by the statute under review here. The court of appeals majority should be reversed.

Finally, the confusion evident in the court of appeals about the proper measure and balance to be given to the various interests at stake illustrates problems inherent in current abortion jurisprudence. This *amicus* and others, learned scholars, jurists, commentators, and members of this Court, have noted the increasingly anomalous nature of the abortion decisions. Even before *Roe v. Wade*, 410 U.S. 113 (1973), this *amicus* has opposed efforts that undermine protection for unborn life, particularly when they also undermine family integrity. Last Term, a bare majority invalidated state efforts to regulate physician-patient dialogue and promote life that, except in the abortion context, would have been strenuously endorsed. *See Thornburgh v. American College of Obstetricians & Gynecologists*, —— U.S. ——, 106 S.Ct. 2169 (1986). In the present case, the normative result should be that the Court affirm that parents play a "substantial, if not the dominant role" in making medical decisions on behalf of their children. *Parham v. J.R.*, 442 U.S. at 604. This principle applies even more strongly when the risks and consequences are irreversible. Especially if this Court believes itself compelled by precedent to affirm, it should recognize that such precedents are opposed, in basic measure, to the promotion of family integrity and other vital interests, and upon such consideration, abandon them.

ARGUMENT

I

A STATE MAY PERMISSIBLY ADVANCE PROTECTION OF THE FAMILY THROUGH A PARENTAL NOTIFICATION STATUTE THAT ALLOWS FOR A BRIEF PERIOD FOR DISCUSSION BETWEEN PARENTS AND THEIR MINOR UNEMANCIPATED DAUGHTER PRIOR TO EXECUTION OF HER DECISION TO ABORT HER UNBORN CHILD.

This Court has announced a constitutional right of a woman to decide whether to terminate her own pregnancy without undue interference by the State. *Roe v. Wade*, 410 U.S. at 153. Although conceding constitutional protection for the interests of parents, it concluded those interests did not warrant blanket parental consent for their child's abortion. *E.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 74-75. Subsequently, it has approved both limited parental consent and notice requirements. *Planned Parenthood Ass'n v. Ashcroft, supra; H.L. v. Matheson, supra.* But it opined that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Planned Parenthood v. Danforth, supra.* Neither, however, is that interest any *less* weighty or less entitled to constitutional protection, particularly when immature minors are involved. Indeed, maturity and competence are not necessarily related to the ability to become pregnant.[1] At these times, dependent immature minors must be encouraged to seek the advice of their parents (or guardians in their absence), and they are entitled to an opportunity to provide that advice before irreversible decisions are executed. When a legislature balances these interests to promote meaningful family consultation, that legislative judgment is entitled to great respect and, unless plainly and indisputably unconstitutional, should be sustained.

[1] Undisputed testimony in *Doe v. Irwin*, 428 F. Supp. 1198, 1205 (W.D. Mi. 1977), indicates that there is a four to five year gap between physical and emotional maturity during adolescence. The subsequent history of the case, including its reversal on other grounds and not on the adequacy of the record, is discussed *infra* at note 17.

A. Legislation Advancing the Public Welfare May Not Be Invalidated Unless Clearly Incompatible With Constitutional Mandate.

The case on appeal here presents the issue whether a statute advancing the state's interest in the public health and welfare contravenes the Constitution as interpreted by this Court. Chief Justice John Marshall once counseled that judging the unconstitutionality of state legislation was a task of "much delicacy, which ought seldom, if ever to be decided in the affirmative in a doubtful case." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1809). *See Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 415 (19851). Legislation should not be voided "on slight implication and vague conjecture." *Fletcher v. Peck*, 10 U.S. at 128. Rather, in reviewing the conformance of a statute with the Constitution, the court must not so act unless and until it forms "a clear and strong conviction of their incompatability [sic] with each other." *Id.* The philosophy inherent in Chief Justice Marshall's admonition is judicial restraint, that courts reach constitutional issues only when strictly necessary. Among other things, this philosophy also serves separation of powers and federalism—"the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947).

The constitutional authority to resolve public debates over which actions shall be undertaken in the public interest is entrusted primarily to the legislative branch. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-21, 423 (1819). A legislature's role in matters affecting important health and safety interests is paramount, espe-

cially as it resolves matters of intense public controversy. *See Berman v. Parker*, 348 U.S. 26, 33 (1954); *Thornburgh v. American College*, 106 S.Ct. at 2196 n.3, 2197 & n.4 (White, J., dissenting). It is not the province of a court to frustrate the legislative will because the law "may seem to the judges who pass upon it, excessive, unsuited to its ostensible end, or based on conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. at 608; *see Baltimore Gas & Electric Company v. NRDC*, 462 U.S. 87, 97 (1983); B. Cardozo, *The Nature of the Judicial Process*, 141 (1921). Rather, it is incumbent upon those attacking a statute to show that the law is "clearly incompatible" with the Constitution. *Legal Tender Cases*, 79 U.S. at 530-31. Appropriate judicial restraint serves the doctrine of separation of powers, as well as federalism, important values which should yield only in the clearest case of a supervening constitutional mandate.

B. Protection of Family Integrity Is an Important Public Welfare Interest that May Be Legitimately Advanced by the State.

The mutual support and interdependence of family members have been strongly endorsed and protected in American law. "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr v. Robertson*, 463 U.S. at 256. Protection of family integrity may be advanced even in competition with the separate interests of its members. *E.g., Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality). More to the point, protection of the family is sufficiently important to justify appropriate limitations on a minor's access to abortion on demand. "There is . . . an important state interest in encouraging a family rather than a judicial resolution of a minor's abortion decision." *Id.* at

648. This case presents an opportunity to reaffirm that principle.

1. *The Family Relationship, Built Upon the Rights and Duties of its Members, Has Merited Substantal Constitutional Protection.*

Constitutional protection of the family is a principle of life and law "deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. at 503. At common law in England and in the United States, the duties of parents to maintain, support, and educate their children were well-established. I W. Blackstone, *Commentaries on the Laws of England*, Ch. 16, 435, 440-41 (1765), II J. Kent, *Commentaries on American Law*, 160 (Da Capo ed. 1971). The duties of children relative to their parents were also well-established. *Id.* The common law family relationship may be described as mutual and reciprocal. I Blackstone, at 440-41; II Kent, at 170-173. Each member was bonded to the other in what one court called a "mutual interest in interdependence." *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). *See* Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to their "Rights"*, 1976 B.Y.U. L.Rev. 604, 615-17, 651-52. The resulting amalgam is neither entirely "parents' rights" nor "children's rights," but certainly "family rights." As a legal entity, the family has routinely been accorded deep respect and the rights of the members, deference.[2]

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[2] Some commentators suggest that the private and distinctive relationship of the family provides important biological and psychological stability for children as well as for parents. Goldstein, *Medical Care for the Child at Risk: On State Supervision of Parental Autonomy*, 86 Yale L.J. 645, 649-50 (1977). *See also* Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 Harv. L. Rev. 1001, 1017-18 (1975). When this *amicus* speaks of "parents," it also includes legal guardians (grandparents, foster parents, etc.) who serve in the place of parents.

Drawing on this rich historical tradition, this Court found the "natural duty of parents" to educate their children to be part of the Fourteenth Amendment liberty interest in marriage, establishing a home, and raising children. *Meyer v. Nebraska*, 262 U.S. 390, 399, 400 (1923). Parental nurture and direction of children is not just a "right" but a "high duty." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).[3] In *Prince v. Massachusetts*, this Court stated:

> It is cardinal with us that the custody, care and nurture of the child must reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions [*Meyer* and *Pierce*] have respected the *private realm of the family which the state cannot enter.*

321 U.S. 158, 166 (1944) (emphasis added); *see Ginsburg v. New York*, 390 U.S. 629, 639 (1968).[4] The "primary role of the parents in the upbringing of their children is now established as an enduring American

[3] The Court in *Wisconsin v. Yoder*, 406 U.S. 205, 213, 232 (1972) described *Pierce v. Society of Sisters* as a "charter of the rights of parents to direct the religious upbringing of their children." If anything this should apply even more strongly to situations involving consideration of abortion, where strong moral or religious convictions regarding the termination of human life will plainly be implicated.

[4] In *Ginsburg v. New York*, the Court upheld a statutory ban on sale of non-obscene but adult-oriented magazines to all minors. 390 U.S. 629 (1968). The Court observed it "has consistently recognized that the parents' claim to authority in their own household is basic in the structure of our society. [quotation from *Prince v. Massachusetts* omitted]. The legislature could properly conclude that parents . . . who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639.

tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).[5]

Children have rights as against certain kinds of parental actions and as against the state. Children cannot, at their parents' direction, be refused beneficial medical treatment or subjected to extensive work hours. *See Application of President and Directors of Georgetown College*, 331 F.2d 1000, 1007-08 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *Prince v. Massachusetts, supra.* Similarly, children cannot be denied rights to political expression or to an expectation of privacy in public schools. *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506, 511 (1969); *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985). Nor can children be deprived of liberty without due process in public schools or in courts. *Goss v. Lopez*, 419 U.S. 565, 574, 575 (1975); *In re Gault*, 387 U.S. 1, 13 (1967). However, neither extension of these rights to children nor the full adult scope of the rights extended was automatic but depended on the nature of the countervailing state and parental interests. *E.g., McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

The resulting blend of "rights," "duties," and "obligations" is the family unit as it is now recognized in the law. Hafen, *supra*, 1976 B.Y.U. L.Rev. at 616-17 and authorities noted therein. Even when it has recognized children's "rights," the Court has not vitiated the normative principle of family life that parents play a "substantial, if not the dominant role" in their children's lives. *Parham v. J.R.*, 442 U.S. at 604; *see Wisconsin*

[5] Even when it supported countervailing interests in some measure, this Court has not failed to restate its fundamental commitment to these precepts. *E.g., Bellotti v. Baird (II)*, 443 U.S. 622, 637-638 (1979) (plurality); *Carey v. Population Services International*, 431 U.S. 678, 687 (1977).

v. Yoder, 406 U.S. at 244 (Douglas, J., dissenting).[6] This role is displaced only where there is a serious threat to the child's health or safety or a "potential for significant social burdens." *Id.* at 233-34; *see Thornburgh v. American College*, *supra*. Thus, even in families where relations between parents and children are strained, parents, because of their interest in preventing the "destruction of their family life," must have a chance to resolve their problems apart from state interference. *Santosky v. Kramer*, 455 U.S. at 753. As this Court recently concluded, "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. at 258.[7]

2. *A Minor's Interest in Seeking an Abortion May Be Limited by the Protected Interest in Preserving Family Integrity.*

In 1973, the Court declined to extend the right to decide whether to terminate a pregnancy to minors. *Roe v. Wade*, 410 U.S. at 165, n.67. In 1976, when the issue was presented, the Court concluded a child had at least

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[6] Although he called for separate evaluation of the children's desires in *Wisconsin v. Yoder*, Justice Douglas recognized that "parents, absent dissent, normally speak for the entire family." 406 U.S. at 244.

[7] The Catholic Church's moral teaching on the role of and protection for the family reflects similar considerations. The Vatican Charter of the Rights of the Family (October 22, 1983) provides that "[p]ublic authorities must respect and foster the dignity, lawful independence, privacy, integrity and stability of every family (Article 6)." The Bishops of the United States have long recognized the need to stabilize and strengthen family life. U.S. Bishops, *Statement on the Christian Family*, ¶¶ 8-10 (November 21, 1949); USCC Administrative Board, *Political Responsibility: Choices for the 1980s*, ¶¶ 42-43 (October 26, 1979), pp. 12-13 (Rev. Ed. March 22, 1984). They have likewise recognized parents may not do that which is injurious to their children. Bishops' Pro-Life Committee and American Jewish Congress, *Joint Statement on Treatment of Handicapped Newborns* (1985).

some protected privacy interest that barred absolute parental control backed by the authority of the law. *Planned Parenthood v. Danforth*, 428 U.S. at 74. At the same time, it recognized that, due to immaturity, stress, and other factors, not every minor could be expected to give fully informed consent. *Id.* at 75, *citing Bellotti v. Baird (I)*, 428 U.S. 132 (1976).[8] There, the Court recognized a need for parental consultation and consent as a limitation on the right of a dependent immature minor to unrestricted access to abortion.

On subsequent hearing of *Bellotti v. Baird* in 1979, a plurality strongly endorsed the need for familial involvement in the lives of dependent children. 443 U.S. at 634, 640. "The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the specal needs of parents and children." *Id.* at 634. In particular, relying on *Ginsburg v. New York* and *Prince v. Massachusetts*, the plurality noted that "minors often lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635, 636. Moreover, it quoted *Ginsburg*, 390 U.S. at 639 (*supra* note 4), that parents "are entitled to the support of laws designed to aid discharge of [their] responsibility." *Bellotti v. Baird*, 443 U.S. at 639.

These considerations are particularly important in the abortion context:

> The abortion decision differs in important ways from other decisions that may be made during minority.
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>
> [C]onsidering her probable education, employment skills, financial resources, and emotional maturity,

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[8] *Bellotti v. Baird (I)*, 428 U.S. 132 (1976), emphasized that while a blanket consent process was invalid under the Court's reading of the Constitution, a consent process was not *per se* invalid, when focusing on dependent, immature minors.

> unwanted motherhood may be exceptionally burdensome for a minor. . . . [T]here are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.
>
> Yet, an abortion may not be the best choice for a minor. In a given case, alternatives to abortion, such as marriage to the father of the child, arranging for its adoption, or assuming the responsibilities of motherhood with the assured support of family, may be feasible and relevant to the minor's best interest.

Id. at 642-43. The plurality endorsed Justice Stewart's view that the State may encourage a minor "to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Id.* at 641, *quoting Planned Parenthood v. Danforth*, 428 U.S. at 91 (Stewart, J., concurring).[9] As long as it imposes no absolute parental veto, *id.*, at 74, a state could insist on consultation and consent, even if in some cases a minor's choice might be limited by her parents' judgment. *Bellotti v. Baird*, 443 U.S. at 643.

These very concerns supported the holding in *H.L. v. Matheson* that a state may require notice to parents that their immature dependent child is seeking an abortion. 450 U.S. at 409-410. Parental notification "plainly serves

[9] Justice Stewart tied his reliance on parental involvement to the fact that the adolescent "under emotional stress, may be ill-equipped to make [the decision] without mature advice and emotional support." *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (Stewart, J., concurring). Clinic personnel, with an economic interest at stake, would not likely offer such "counsel and support." *Id.* As the plurality expanded in *Bellotti v. Baird (II)*, 443 U.S. at 642 n. 21: "Many minors who bypass their parents probably will resort to an abortion clinic, without being able to distinguish the competent and ethical from those that are incompetent and unethical." Parental "consultation and consent" are the "traditional way by which states have sought to protect children from their own immature and improvident decisions." *Planned Parenthood v. Danforth*, 428 U.S. at 95 (White, J., dissenting).

the important considerations of family integrity and protecting adolescents which [were] identified in *Bellotti v. Baird (II)*." *Id.* at 411 (footnotes citing cases omitted). Thereafter, applying these principles, the Court upheld a parental consent statute. *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. at 490-91, 505. Nothing in this Court's most recent decisions[10] alter the constitutional decisionmaking standard established in *Bellotti v. Baird (II)*.

This Court's abortion decisions do not negate the principle that the integrity of the family unit is itself a privacy interest deserving of constitutional protection. *Lehr v. Robertson*, 463 U.S. at 258. Indeed, in many cases such as the present, that interest is superior to and may limit the access of a dependent immature minor to abortion.

C. The Illinois Statute Facilitating Family Discussion of a Minor's Decision to Abort Her Child Promotes the State's and the Family's Interests in Family Integrity and Is Not Clearly Incompatible with the Constitution.

Both the parents' rights and their child's rights are implicated by abortion. *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 416, 428 n.10 (1983). The child's desire for her solution can strain against the parents' natural desire to provide guidance, direction, and support in making that decision. The integrity of the family is at stake. "The importance of the familial relationship, to the individual involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life' . . . ." *Smith v.*

[10] *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S.Ct. 2169, 2177 n.9 (1986); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 428 n.10, 439-440 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-91, 505 (1983).

Organization of Foster Families, 431 U.S. 816, 844 (1977), *quoting Wisconsin v. Yoder*, *supra*. Whatever the strain of this crisis, at least the family should be entitled to seek its own path among the alternatives—a path that "promotes [its own] way of life." *Id. See also Santosky v. Kramer*, 455 U.S. at 753, *Bellotti v. Baird (II)*, 443 U.S. at 649.

In these circumstances, a waiting period facilitates that search among family members. This Court has cautioned against "intrusion by a State into family decisions," *Wisconsin v. Yoder*, 406 U.S. at 231, delineating instead a "private realm of the family which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. at 166. A state is plainly on solid constitutional ground when, after balancing the various interests, it chooses to assure some private space for a family to discuss an adolescent's abortion decision. *Bellotti v. Baird*, *supra*.

1. *The Illinois Statute Promotes Family Integrity by Permitting Meaningful Discussion of the Minor's Decision to Obtain an Abortion.*

A principal purpose of the Illinois Parental Notice of Abortion Act is protection of the privacy and integrity of the family unit. Section 4(a) of the Act provides that no abortion may be performed on an unemancipated minor until twenty-four hours have elapsed after notice to her parents of her intention to have the abortion. Ill. Rev. Stat. ch. 38, ¶¶ 81-64(a) (1983). The legislature not only sought to protect children from their immaturity and to assure parental rights, *id.* ¶¶ 81-62(a)(1), (3) but also intended to "foster[ ] the family structure and preserv[e] it as a viable social unit." *Id.* ¶ 81-62(a)(2). In this twenty-four hour period, parents are permitted to review and discuss their daughter's decision to abort her child and to attempt some resolution upon which all might agree. Afterwards, the minor may obtain the abortion without legal restraint. Ill. Rev. Stat., ch. 111,

¶ 4501 (1983).[11] Still however, the chance to reconcile the family to its own path is worthy of protection if the family is to retain its social vitality.

The Illinois statute is a reasonable attempt to shield the parents and their daughter for one brief moment prior to execution of the daughter's abortion decision. The dissenting judge below noted the importance of this moment:

> [T]he twenty-four hour period allows parents to discuss and explain the moral implications and deep religious concerns, if any, that are involved in the decision of whether or not to abort a pregnancy. The parents, likewise, may offer their young child valuable experience, counsel and advice concerning the short- and long-term effects of bearing a child and of terminating a pregnancy. All too often minor children find themselves trapped on an "abortion treadmill" . . . . The parents can help the child reflect upon abortion alternatives, reviewing the positive and negative aspects of adoption and extended family care. . . . Similarly, the parents, who have raised their child from birth, are in a better position to reasonably and objectively examine the psychological, moral, medical, social, economic, and practical considerations. . . .

Zbaraz v. Hartigan, *supra*, 763 F.2d at 1552 (Coffey, J., dissenting). What the parents can offer in this moment is the very essence of their legitimate interest in, love and concern for their daughter. What the child who has already made a decision—perhaps in haste—to obtain an abortion may offer is not submission, but dialogue. *See*

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[11] Illinois allows pregnant minors to consent to any medical or surgical procedure. Ill. Rev. Stat., ch. 111, ¶ 4501. This statute was added in 1961 and the legislature could not have foreseen its use in consenting to abortions. The statute is one of several exceptions to the general rule that parents consent to the performance of any medical or surgical procedure on their unemancipated children. *Compare id.* ¶ 4503 *with id.* ¶ 4502.

Ill. Rev. Stat., ch. 111, ¶ 4501. In assuring this brief moment, what the state protects is a rough balance between separate interests in order to support the integrity of the family, a larger interest shared by all its members. This interest, worthy of separate constitutional protection, is trivialized by the majority in the court below.

Ignoring the express purpose and intent of the law, Ill. Rev. Stat. ch. 38, ¶ 84-62, the majority uncritically assumed the only interest served by the statute is a general parental prerogative that is served by mere notice. 763 F.2d at 1538. This "notice" does not advance in a *meaningful* way the important familial interests at stake. Mere notice is not sufficient; stripped of a waiting period, even notice by telephone that an abortion is imminent at some undisclosed location would suffice. *Id.* at 1553 (dissenting opinion).[12] The majority gave not even passing acknowledgment to the line of decisions protecting the integrity of the family relationship (*see* pages 9-11, *supra*). That relationship is not advanced by foisting the decision of the child upon the parents. It is advanced ultimately by discussion, even spirited discussion, and decisions based on information rather than on emotion. The family must be entitled to the time and the private space to deliberate on its own about the implications of the abortion decision. Given the important private interests at stake, Illinois virtually had no other choice but to protect the family.

It is well-settled that parents are entitled to the support of laws designed to aid the discharge of their responsibility for their children. *Ginsburg v. New York*, 390 U.S. at 639; *see F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 758 (1978) (Powell, J., concurring). The Illinois parental notice statute does just that by supporting meaningful parental involvement in a child's abortion decision, thereby promoting the integrity of the family.

[12] Short of consent, the waiting period materially advances familial interests; mere notice does not. Notice in these trying circumstances only allows for discussion after the fact, when the unborn life that might have been saved has been ended. There can be no reasonable dispute that the members of the family possess an interest in, even a bond to, the life of another member. The waiting period facilitates discussion about all these relevant interests. The process of meaningful discussion both characterizes and is of particular significance to the family unit.

2. *The Illinois Statute Strikes the Proper Balance Among the State, Family, and Individual Interests.*

What this Court forbade in *Roe v. Wade* and subsequent cases was not *any* regulation of the process by which a woman chooses whether or not to terminate her pregnancy through abortion. Rather, this Court was concerned with *undue* burdens on decisionmaking. *Maher v. Roe*, 432 U.S. 464, 473-74 (1977); *see Akron v. Center for Reproductive Health*, 462 U.S. at 430-31. When an abortion decision is to be made by an immature minor, laws facilitating parental involvement, even consent, are not undue burdens. *Planned Parenthood v. Ashcroft, supra; H.L. v. Matheson*, 450 U.S. at 410, 411. "As every pregnant minor is entitled in the first instance to go directly to the court for a judicial determination without prior parental notice, consultation or consent, the general rule with respect to parental consent does not unduly burden the constitutional right." *Bellotti v. Baird (II)*, 443 U.S. at 649. Because procedures exist for minors to obtain a judicial waiver of the notice requirement, the only "burden" arguably imposed by the Illinois statute is on those minors deemed incapable of deciding for themselves without consultation, that is, dependent immature minors. For them, if parental consultation is a "burden", it is certainly not undue.[13] The legislature acted properly in so concluding.

[13] In *H.L. v. Matheson*, 450 U.S. 398, 412 (1981), this Court upheld Utah's statute even though it did not provide a waiting period. Although it noted "time was of the essence" in executing the abortion decision, it cited state statutes providing a waiting period without further comment. *Id.* Time is not so much of the

Opponents of the waiting period for immature minors assert that the statute nonetheless "unduly burdens" a minor's decision to obtain an abortion because parents might, on occasion, discourage an abortion that is in the best interests of their child. Such argumentation was implicit in the court of appeals opinion. *See* 763 F.2d at 1539. This assertion involves two assumptions—that parents act contrary to their children's best interests that abortion *is* in the best interests of the child assumptions are unwarranted and contrary to ments expressed by this Court.

As to the first assumption, the common law heritage from Blackstone and Kent discussed above (*see* page 9, *supra*), presumes that the "natural bonds of affection lead parents to act in the best interests of their children." *Parham v. J.R.*, 442 U.S. at 602. Although "experience and reality may rebut what the law accepts as a starting point" . . ., "[s]imply because the decision of a parent is not agreeable to the child or because it involves risks does not automatically transfer the power to make that decision from the parents. . . ." *Id.* at 602, 603. In the absence of specific evidence of parental action, this Court has resisted the suggestion that it presume the worst. *H.L. v. Matheson*, 450 U.S. at 413; *Wisconsin v. Yoder*, 406 U.S. at 232.

As to the second assumption, *H.L. v. Matheson* authoritatively dismissed the assertion that abortion is in the best interest of the unemancipated minor:

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essence in the abortion decision that uncritical reliance must be placed on *Akron v. Center for Reproductive Health*, 462 U.S. at 450-51, and related cases invalidating waiting periods applicable to adults. Those cases voided waiting periods on grounds that they did not promote informed consent. In this regard, a district court, in invalidating a 48 hour waiting period as excessive, conceded some waiting period promoted meaningful family discussion. *Hodgson v. Minnesota*, No. 3-81-CIV-538, Findings of Fact 73 & 74 (D. Minn. Nov. 6, 1986) (available on Westlaw, DCT library). As demonstrated herein, the state's stake and family privacy interests are also apposite distinctions supporting waiting periods for minors.

> If the pregnant girl elects to carry her child to term, the *medical* decision to be made entails few—perhaps none—of the potentially grave emotional and psychological consquences of the decision to abort.

450 U.S. at 412-13, *see id.* at 411 and n.20 (describing unique medical, emotional and psychological complications associated with an adolescent's decision to have an abortion not presented in adult cases). Those consequences are too grave to secure unrestricted exercise of the abortion decision for minors.

The effort to overturn the considered judgment of the Illinois legislature advancing meaningful family discussion over the *de minimis* "burden" imposed on the adolescent must be firmly rejected. In *H.L. v. Matheson*, *supra*, this Court found that any inhibition of the decision to obtain an abortion based on actual or perceived parental action due to statutory notice was of *no* constitutional significance. Moreover, this Court has upheld consent statutes which present the possibility that parents may withhold consent and there may be no abortion. *Planned Parenthood Ass'n v. Ashcroft, supra.* Given these prior decisions, the Illinois statute challenged here is plainly constitutional. Closing the door on parental involvement in their children's lives, however, contravenes important constitutionally protected interests, and sacrifices family integrity to the adolescent's perceptions of self-interest.[14] This is indeed a shallow basis upon which to allow reversal of the statute in question.

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[14] In this regard, this *amicus* notes the brief of *amici* Family Life League, *et al.* in this docket examining the sociological and psychological works supporting the need for parental consultation in these circumstances. Allowing secret abortions undermines the bonds of trust and communication in a family, cutting off the adolescent from those who love her. Crisis, argument, and discussion are inherent in family decisionmaking. Fear of the process does not justify judicially mandated avoidance by those who stand to benefit most.

It is not the province of courts to speculate about the quality of family relations and about the wisdom of particular legislation. *See Otis v. Parker*, 187 U.S. at 608. To do so is to exercise judicial review by, as John Marshall stated, "slight implication and vague conjecture." *Fletcher v. Peck*, *supra*. That is precisely what happened in the court below. Unless the legislation is "clearly incompatible" with the Constitution, *Legal Tender Cases*, *supra*, it may not be set aside. Here, Illinois was on firm constitutional ground in striving to balance separate constitutional interests—it imposed no "undue burdens" on anyone. The legislature's efforts to balance these interests is reasonable and deserves the affirmation from this Court that was refused below.

II

ESPECIALLY IF THIS COURT FEELS BOUND BY PRECEDENT TO AFFIRM THE COURT OF APPEALS, THE COURT SHOULD RECONSIDER ITS ABORTION JURISPRUDENCE.

The court of appeals' simplistic analysis of the sensitive interests embodied in the Illinois statute and its uncritical application of prior decisions only arguably controlling should be swiftly undone. This *amicus* respectfully submits, however, that the confusion evident in the court of appeals decision about the scope of review in this kind of case is symptomatic of larger problems in abortion jurisprudence. This jurisprudence is contrary to other similar cases not involving abortion and, in vindicating a limited decision of a woman, other important concerns—state regulation in the public interest, parents' rights and obligations, and the right to life—have been undermined. Especially if the Court feels compelled by precedent to affirm in the instant case, it should reconsider and abandon precedents incompatible with these concerns.[15]

[15] This would include overruling *Roe v. Wade*, 410 U.S. 113 (1973), if inconsistent with the result urged here. Such an action would also be appropriate for many other jurisprudential reasons. Wardle, *Rethinking Roe v. Wade*, 1985 B.Y.U. L.Rev. 231. Such a result has long been urged by this *amicus*. U.S. Bishops, Pastoral Plan for Pro-Life Activities (November 1975). This Court has not hesitated to reconsider such decisions "where experience, scholarship, and reflection demonstrated that their fundamental premises were not to be found in the Constitution." *Thornburgh v. American College*, 106 S.Ct. at 2193 (White, J., dissenting).

The extent to which prior abortion decisions ignore broad and legitimate state regulatory interests in the conduct of the medical profession in favor of narrow private interests was the subject of this *amicus*'s brief in *Thornburgh v. American College*, *supra*. The public interest allows the state to regulate the scope and detail of physician-patient informed consent conversations on any number of subjects—breast cancer, infant care and nutrition, and other sensitive matters—but not on abortion. USCC Brief in No. 85-495, at 10-13. This incongruence between virtually identical forms of medical regulation, among other things, led members of this Court to call for reconsideration of *Roe v. Wade* itself. *Thornburgh v. American College*, 106 S.Ct. at 2190-92 (Burger, C.J., dissenting), and at 2198, 2199-2201 (White, J., dissenting).

Respecting parental rights and familial obligations, other decisions of this Court allow parents a "substantial, if not the dominant role" in making medical treatment decisions for their children. *Parham v. J.R.*, 442 U.S. at 604 (analyzing and rejecting *Danforth*). While conceding that parents lack absolute and unreviewable control over their children, the *Parham* case is inconsistent with the *Danforth* case on parental consent. Because this Court has found that "children, even in adolescence, simply are not able to make sound judgments concerning . . . medical care or treatment," *Parham v. J.R.*, 442 U.S. at 603, it must not divest parents of meaningful input to their dependent child's abortion decision. What the Court recognized in *H.L. v. Matheson*, 450 U.S. at 412-13, about

the grave consequences of abortion strengthens the need for effective and meaningful parental involvement.[16] This *amicus* agrees with the district judge in *Doe v. Irwin*, 428 F. Supp. at 1207, who referred to the absence of meaningful parental notice in a related context as a "frightening alternative."[17] That statement is even more apt when the consequences are irreversible.

Finally, *Roe v. Wade* and subsequent cases have advanced the abortion decision against reasonable efforts to protect unborn life. The Court has identified the state's interest in the child's life, but yet has denied numerous substantial efforts aimed at promoting that interest. *Thornburgh v. American College*, 106 S.Ct. at 2196-97, 2203, 2205 (White, J., dissenting). This *amicus* has long held that whatever might be said about the character of protected constitutional liberty generally, no liberty requires the death of an innocent child. *Id.* at 2195-96 n.2. In no other context, including parent-child relations, does the Court allow one's "liberty" claim to present a serious risk of harm to another. *See, e.g., id., Wisconsin v. Yoder*, 406 U.S. at 233-34; *Prince v. Massachusetts*, 321 U.S. at 170. It is time for the same result to attain here.

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[16] The fact that "abortion" is called a "fundamental" right should not be determinative. The first amendment interest advanced in *Ginsburg v. New York* is presumably no less fundamental and protected, 390 U.S. 629, 936 (1968). Yet this Court flatly refused to sustain that position, instead siding with the legislature and endorsing parents' obligations and interests. *Id.* at 639. No judicial alternative procedure was needed for minors to demonstrate their "emancipation" or "maturity". The prospect of an arbitrary parental veto was not considered fatal.

[17] The district court's opinion holding that parental notice about dispensation of contraceptives to their children was required was ultimately reversed. 559 F.2d 1219 (6th Cir.), *on remand*, 441 F.Supp. 1247 (W.D.Mi. 1977), *rev'd*, 615 F.2d 1162 (6th Cir. 1980), *cert. denied*, 447 U.S. 829 (1981). This does not change the comment—dicta—or the strength of our agreement with it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 85-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

v.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-673

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

v.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

---

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS

Americans United for Life is a national public interest law firm which specializes in litigation relating to abortion, euthanasia and infanticide and which is dedicated to

fostering respect for all stages of human life. Americans United for Life has filed briefs in approximately fifteen abortion cases before the United States Supreme Court and also engages in litigation in both the federal and state courts.

SUMMARY OF THE ARGUMENT

This Court has jurisdiction to hear this case under § 1254(2). The Court of Appeals issued a final judgment with respect to both questions that were presented for review. Illinois, by virtue of the Court of Appeals' decision, will never be able to enforce a 24-hour waiting period regardless of whether the district court ever has an opportunity to render a decision on the sufficiency of additional rules, if or when those rules are promulgated by the Illinois Supreme Court. Thus, there is a final appealable judgment with respect to the 24-hour waiting period.

Moreover, although the injunction that was issued by the Court of Appeals may appear temporary in nature, that injunction may, as a practical matter be permanent because the Illinois Supreme Court may never promulgate rules for the district court to review. This Court has jurisdiction to review whether the issuance of an injunction, which in effect may be permanent, was correct in the first instance, and, if it was not, to reverse the decision of the Court of Appeals and direct that the injunction be dissolved. Since this Court could have reviewed both questions under § 1254(2), the fact that it has chosen to review only one of those questions does not affect its ability to review the other.

Furthermore, neither the policies underlying § 1254(2) nor those underlying the final judgment rule would be served by dismissal of this appeal. Therefore, this Court has proper jurisdiction under § 1254(2) to review the question of whether a state may require that pregnant

minors delay their abortion for 24 hours after their parents have been notified.

Should this Court determine that it lacks jurisdiction to hear this appeal under § 1254(2), it should nevertheless proceed to the merits of this case by invoking its certiorari jurisdiction under § 1254(1). The validity of the 24-hour waiting period is an issue which meets the criteria governing review on certiorari as set forth by the Rules of this Court. The Seventh Circuit's decision is in conflict with a decision of the Sixth Circuit which upheld a parental notice provision requiring a 24-hour waiting period. Also, the Court of Appeals has decided an important question of federal law which has not directly been, but should be, settled by this Court. Similar statutes containing waiting periods are presently pending in the federal courts and the question is likely to recur. Moreover, the court decided this question in a manner that conflicts with this Court's holding in *Planned Parenthood v. Ashcroft*.

Finally, a decision by this Court on the 24-hour period could only be advisory if a judicial bypass procedure is constitutionally mandated in the context of a parental notice statute. If no such procedures are constitutionally mandated, any subsequent ruling by the district court regarding the sufficiency of additional Illinois Supreme Court rules would be immaterial from a constitutional perspective. It would be proper for this Court to first address the question of whether bypass procedures are necessary because the Court of Appeals explicitly held that they were and relied on that holding in striking the 24-hour waiting period. The Court of Appeals erred in making this determination and a decision by this Court holding that bypass procedures are not necessary in the context of a notice provision would obviate the need for further proceedings and would not be merely advisory.

Not only does a 24-hour waiting period further important state interests in protecting minors from making imprudent choices concerning important decisions that have grave and long-lasting consequences, it also protects the fundamental constitutional right of parents to direct the rearing of their children. Parents cannot exercise this right without being notified prior to the performance of an abortion on their teenage daughter.

This Court has often held that when a person is entitled to be notified of some event, due process requires that he be given meaningful notice. Meaningful notice, in the context of parental notice of a minor's abortion, cannot be assured without a waiting period. In the absence of a required waiting period, the abortion clinic may notify a girl's parents while she is in the operating room and proceed immediately with the abortion, effectively precluding parents from consulting with their daughter during this stressful time.

This Court has already held that a state may require a pregnant teenager to delay her abortion until she has either secured her parent's consent or has secured a court order authorizing the abortion. Either of these options will almost certainly require that the abortion be postponed for more than 24 hours and, if the minor does not secure parental or judicial consent, she will have to permanently delay her abortion and carry her child to term. The Seventh Circuit's decision holding that a 24-hour delay is unduly burdensome is contrary to this Court's prior decisions allowing parental consent which would require delays in excess of 24 hours. Accordingly, the decision of the Court of Appeals should be reversed.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS CASE.

This appeal is taken from a decision by the Court of Appeals: 1) holding the 24-hour waiting period, required by the Illinois Parental Notice law, unconstitutional, and 2) enjoining enforcement of the statute "until the Illinois Supreme Court enacts rules assuring the expeditious and confidential disposition of the judicial hearings," and "remand[ing] the case to the district court for a determination of the constitutionality of the waiver of notice proceedings when such rules are enacted." *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985). Two questions were presented for review: 1) whether the court erred in striking the 24 hour waiting period, and 2) whether the court erred in enjoining enforcement of the statute pending promulgation of additional rules and regulations by the Illinois Supreme Court. Appellant argued that the 24-hour waiting period was constitutional and that the bypass procedures were also facially valid because existing rules of civil procedure in Illinois provided for expedited and confidential appeals in accordance with this Court's decision in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

This Court postponed jurisdiction and limited review to the constitutionality of the 24-hour waiting period. 107 S.Ct. 267 (1986). No issue of jurisdiction was presented in the Jurisdictional Statement or Motion to Dismiss or Affirm, and the Court did not state in its order the precise jurisdictional question to be addressed by the parties. Thus, it is not readily apparent why jurisdiction was postponed.

The Court may be concerned about whether it has proper statutory jurisdiction under 28 U.S.C. § 1254, or it may be concerned that this case is not ripe for review and, therefore, that jurisdiction is lacking under Art.

III of the Constitution. Whatever the Court's concerns, however, it seems that they are unwarranted. The Court has jurisdiction under § 1254(2) since the judgment below is "final" with respect to the questions presented for review. Moreover, should the Court determine that the judgment below is non-final, it should, pursuant to 28 U.S.C. § 2103, treat the papers filed as a petition for certiorari and grant the petition. Finally, there is a case or controversy with respect to the 24-hour waiting period sufficient to meet the requirements of Art. III jurisdiction.

A. Jurisdiction Under Section 1254(2) Is Proper Since This Appeal Is From A Final Judgment Of The Court of Appeals.

There is a final judgment regarding both of the questions that were presented for review. Regardless of whether the Illinois Supreme Court ever decides that additional rules are desirable and promulgates such rules, it is clear that Illinois, by virtue of the Court of Appeals' decision, cannot require that teenage girls wait 24 hours after their parents have been notified to obtain an abortion. Thus, there is a final appealable judgment with respect to the 24-hour waiting period.

The Court also would have had jurisdiction to review the second question had it chosen to do so. This Court has recognized that the finality rule has traditionally been given a "practical rather than a technical construction." *Firestone Tire & Rubber v. Risjord*, 449 U.S. 368 (1981), *quoting*, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-414 (1926). Although the injunction that was issued by the Court of Appeals may appear temporary in nature, that injunction may, as a practical matter, be permanent. There is no indication that the anticipated further review of this case by the district court will ever come to pass. The Illinois Supreme Court has not promulgated any rules governing the judicial bypass provisions since the Court of Appeals rendered its decision over a year and one-half ago. Thus, the statute may forever be enjoined pending promulgation of rules that will never be forthcoming.

A decision by this Court holding that the issuance of further rules by the Illinois Supreme Court is unnecessary and that the law is facially valid would eliminate the need for further review by the district court and finally resolve this litigation. Thus, this Court would have had jurisdiction to review whether the issuance of an injunction, which in effect may be permanent, was correct in the first instance, and, if it was not, to reverse the decision of the Court of Appeals and direct that the injunction be dissolved. Since this Court could have reviewed both questions under § 1254(2), the fact that it has chosen to review only one of those questions should not affect its ability to review the other.[1]

Furthermore, neither the policies underlying § 1254(2) nor those underlying the final judgment rule would be served by dismissal of this appeal. The policy underlying § 1254(2) is to "ensur[e] that state laws are not erroneously invalidated." *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976). Dismissal of this appeal would undermine this policy. The State has claimed that the Seventh Circuit erroneously invalidated its law. If the Illinois Supreme Court never issues additional rules, the Court of Appeals' injunction will remain in force permanently. Dismissal of this appeal would effectively put the State "out of court"—never able to enforce its statute, while never being able to have the Court of Appeals' decision reviewed on appeal.

Also, the outcome of the issue on remand will not moot the question regarding the constitutionality of the 24-

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[1] Moreover, if this Court's own decision to limit its review to question one somehow affects its jurisdiction to hear this case, the Court could remedy that problem by simply reviewing both questions.

hour waiting period. Regardless of the district court's holding regarding the sufficiency of any new rules which might be promulgated, the question on the 24-hour waiting period will remain and the policy of avoiding needless constitutional decisions would not be furthered by dismissing this appeal.

Finally, the final judgment rule is designed to prevent piecemeal review and "requires 'that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits.'" *Flanagan v. United States*, 104 S.Ct. 1051 1054 (1984), *quoting*, *Firestone*, 449 U.S. at 374. The State did not present this appeal in a piecemeal fashion, but rather, sought timely review of *both* issues which were determined with finality by the Court of Appeals. Thus, if review of this case is piecemeal, it is due to the fact that this Court has limited its review to the validity of the waiting period, not to any actions of Appellants.

In *Flanagan*, this Court identified the interests protected by the final judgment rule stating:

> The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the pre-judgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

104 S.Ct. at 1054.

This appeal does not in any manner vitiate these stated interests. This is not a case wherein the district court has never had a chance to render a final judgment and is being deprived of its opportunity to do so. Rather, the district court had rendered a final judgment and perma-

nently enjoined enforcement of the Act and has only reluctantly become the recipient of this case on remand. Nor does the appeal in any way harass Appellees or clog the courts. Indeed, it would ill-serve the administration of justice to have this case indefinitely carried on the District Court's docket. A decision by this Court favorable to Appellants could finally terminate this litigation making further review unnecessary, and thereby promote judicial efficiency.

Given the finality of the judgment with respect to the issues raised, the fact that a ruling on those issues could dispose of the case, and the uncertainty of when, if ever, the state Supreme Court might issue the rules and regulations required by the Court of Appeals, this appeal represents the most appropriate and efficient course of action. Accordingly, the Court has proper jurisdiction under § 1254(2) to review the question of whether a state may require that pregnant minors delay their abortion for 24 hours after their parents have been notified.

B. Even If Jurisdiction Under Section 1254(2) Were Deemed Improper, The Court Should Treat the Papers As A Petition for Certiorari and Exercise Jurisdiction Under Section 1254(1).

If, for any reason, this Court should determine that it lacks jurisdiction to hear this appeal under § 1254(2), it should nevertheless proceed to the merits of this case by invoking its certiorari jurisdiction under § 1254(1). This Court, pursuant to 28 U.S.C. § 2103, has often treated papers which have been filed as appeals to be petitions for certiorari and granted review if the requirements for certiorari are met. *See Thornburgh v. American College of Obstetricians*, 106 S.Ct. 2169 (1986); *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986). In *City of Renton*, an appeal had been taken pursuant to § 1254(2). Although the Court had noted probable jurisdiction, it dismissed the appeal, treated the

papers as a petition for certiorari and granted review stating:

> The present appeal seeks review of a judgment remanding the case to the District Court. We need not resolve whether this appeal is proper under § 1254(2), however, because in any event we have certiorari jurisdiction under 28 U.S.C. § 2103.

106 S.Ct. at 927 n.1.

The validity of the 24-hour waiting period is an issue which clearly meets the criteria governing review on certiorari as set forth by the Rules of this Court. Sup. Ct. R. 17.1. First, the decision of the Court of Appeals striking the Illinois 24-hour waiting period is in conflict with the decision of the Sixth Circuit which upheld a parental notice provision requiring a 24-hour waiting period between the time that a minor's parents were notified and the time of the abortion. *See Akron Center for Reproductive Health v. City of Akron*, 651 F.2d 1198, 1205-1206 (6th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 416 (1983); *see also Akron Center for Reproductive Health v. Rosen*, 633 F.Supp. 1123, 1138-1139 (N.D. Ohio 1986). Second, the Court of Appeals has decided an important question of federal law which has not been directly, but should be, settled by this Court, and has done so in a manner that conflicts with applicable decisions of this Court. As the Court of Appeals noted in *Zbaraz*, "the Supreme Court has not specifically addressed the application of waiting periods only to minors or weighed the state's interest in promoting parental consultation with a minor who seeks to obtain an abortion against the burdens imposed on minors by a waiting period." 763 F.2d at 1535. That question should be settled by this Court because at least three state statutes requiring parental notice with a waiting period including Illinois, are presently in litigation,[2] and two other

[2] *See also* Ohio Rev. Code Ann. § 2919.12 (Page Supp. 1985), *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *appeal docketed, sub nom. Akron Center for Reproductive Health v. Slaby*, No. 86-3717 (6th Cir. July 18, 1986); Minn. Stat. Ann. § 144.343 (West Supp. 1985), *Hodgson v. State of Minnesota*, No. 3-81-CIV 538 (D. Minn. Jan. 23, 1985), *appeal docketed*, No. 86-5423-MN (8th Cir. Nov. 18, 1986), *cross-appeal docketed*, No. 86-5431-MN (8th Cir. Nov. 24, 1986).

such statutes have not yet been challenged.[3] Thus, it is not unlikely that this question will be recurring. Finally, as set forth in more detail in Part II of this brief, the decision of the Court of Appeals, conflicts with this Court's decision in *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983).

C. There Is A Case or Controversy With Respect to the 24-Hour Waiting Period Sufficient to Satisfy Art. III Jurisdiction.

The fact that this Court postponed jurisdiction may signify that it is concerned about the possibility that the Illinois Supreme Court will never issue any additional rules and that the injunction against the law will never be lifted and, therefore, any ruling by this Court would be purely advisory. Although this line of reasoning would support the State's claim that the Court of Appeals' injunction is, indeed, permanent and therefore, final and appealable, it would not prevent this Court from rendering a decision with respect to the 24-hour waiting period.

A decision by this Court on the 24-hour waiting period could only be advisory if a judicial bypass procedure is constitutionally mandated in the context of a parental notice statute. If no such procedures are constitutionally mandated, Illinois' creation of a judicial bypass procedure is a purely gratuitous accommodation of the interests of minors seeking abortions without parental notification that may be withdrawn or withheld by the State at will. Thus, it would not matter whether the Illinois Supreme Court ever issues any rules because any subse-

[3] Idaho Code § 18-609 (Supp. 1985); W.Va. Code § 16-2F-3 (1985).

quent ruling by the district court regarding those rules would be immaterial from a constitutional perspective.

A decision by this Court on the 24-hour waiting period which first addresses the question of whether the bypass procedures are necessary and finds that they are not,[4] would "obviate the need for further proceedings" and would not be merely advisory. *Dukes*, 427 U.S. at 302. Moreover, it would be entirely proper for this Court to first address that question because it was fairly presented within the question on which this Court has granted review and was explicitly ruled upon by the Court of Appeals. This Court has refused to review questions where "neither the District Court nor the Court of Appeals addressed the question directly," and the "issue is clouded by an ambiguity in state law," *G.D. Searle & Co. v. Cohen*, 455 U.S. 404, 413 (1982). However, where the question is one regarding the proper legal standards to be applied and the question has been ruled upon by the lower courts, this Court has found it appropriate to address that question. *See Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5. (1980).[5] *See also Cuyler v. Sullivan*, 446 U.S. 335, 342-43 (1980).

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[4] For the reasons set forth in Part III of this brief, this Court should determine that states are not required to provide a judicial alternative in the context of a parental notice statute.

[5] In *Vance*, the district court ruled in favor of the Secretary of State determining that he had established by a preponderance of the evidence that the plaintiff had voluntarily and knowingly renounced his citizenship. The Court of Appeals reversed, holding that the government must prove that citizenship was intentionally renounced by clear and convincing evidence and remanded the case to the district court for a determination based on the higher standard of proof. In this Court, the Secretary argued that he need only show that the person voluntarily committed an act that was so inconsistent with retention of American citizenship that its natural consequences can be presumed. The Court addressed that question even though the Court of Appeals had not specifically ruled upon it, noting that "the intent issue is fairly comprised in the question set forth in the jurisdictional statement." *Vance*, 444 U.S. at 258 n.5. Had the Secretary's argument been correct, the Court of Appeals' holding would fall out of necessity.

The Court of Appeals specifically addressed and ruled upon the question of whether a judicial alternative to parental notice was constitutionally mandated. In the section of the Court of Appeals' opinion expressly limited to discussion of the waiting period, the court analyzed this Court's rulings on parental involvement in the abortion decisions of minors and concluded that a state requiring such notification must also afford minors an opportunity to seek a waiver of notice through judicial process. *Zbaraz*, 763 F.2d at 1536. "[A] mature minor or an immature minor in whose best interest it is to have an abortion has a constitutional right to have an abortion without notifying her parents." *Id.*

This holding was one predicate on which the court's conclusion that the mandatory waiting period was unconstitutional rested. In reaching its decision, the court gave two reasons why the waiting period was unconstitutional. The first reason given was that it "imposes a far greater burden on a minor's rights than a parental notification requirement which provides an exception to notification for mature minors and immature minors whose best interests require an abortion." *Id.* at 1538. According to the Court's reasoning, a judicial bypass procedure is constitutionally mandated, not only in the context of a parental consent statute but also in the context of a parental notice statute.

Therefore, if this Court is concerned that it may render an advisory opinion regarding the 24-hour waiting period, it may avoid that difficulty by additionally addressing the above question and holding that bypass procedures are not necessary in the context of a parental notice law.

II. UNDER THIS COURT'S PRECEDENTS, A STATE MAY REQUIRE THAT A TEENAGE GIRL WHO INTENDS TO OBTAIN AN ABORTION POSTPONE EFFECTUATION OF HER DECISION FOR 24 HOURS AFTER HER PARENTS HAVE BEEN NOTIFIED.

A. A 24-Hour Waiting Period Furthers Important State Interests In Protecting Minors And Furthers The Rights Of Parents To Consult With Their Teenage Daughter About The Abortion Decision.

Parental notice and consent are qualifications that typically may be imposed on a minor's right to make important decisions[6] because minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences. *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (Bellotti II). As Justice Stewart wrote in his concurring opinion in *Planned Parenthood v. Danforth*:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an

[6] Illinois requires parental consent for minors to marry. Ill. Rev. Stat. ch. 40, § 203(1) (1985). Indeed, it also protects the integrity of important decisions of adults by requiring waiting periods. Like many other states, Illinois does not consider a woman's consent to the adoption of her child to be valid if given within 72 hours of the child's birth. Ill. Rev. Stat. ch. 40, § 1511 (1985). It also requires that 24 hours elapse between the time that a marriage license is issued and the time that it becomes effective. Ill. Rev. Stat. ch. 40, § 207 (1985).

> abortion clinic, where abortions for pregnant minors frequently take place.

428 U.S. 52, 92 (1976).

Moreover, the Court has stated that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). This right and duty to direct the upbringing of one's children "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972). Acknowledging these parental rights, Justice Powell wrote that "[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Bellotti II*, 443 U.S. at 638-39. Justice Powell also noted that parental consultation is "particularly desirable with respect to the abortion decision—one that for some people raises profound moral and religious concerns." *Id.* at 640.

Thus, parents have a fundamental constitutional right to direct the rearing of their children. *Bellotti II*, 443 U.S. at 639 n.18 and cases cited therein. This fundamental constitutional right of parents to have a guiding role in the upbringing of their children entitles them to notification prior to the performance of an abortion upon their daughter.

This Court has often held that when a person is entitled to be notified of some event, due process requires that he be given meaningful notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Meaningful notice is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, at 314.

Meaningful notice in the context of parental notice of a minor's abortion cannot be assured without a waiting period. In the absence of a required waiting period, the abortion clinic may notify a girl's parents while she is in the operating room and proceed immediately with the abortion. Thus, parents would not be afforded "an opportunity to present their objections" to their daughter concerning the wisdom of the abortion, and minors would be deprived of the benefits that the advice of their parents would be likely to offer during this stressful time.[7] Accordingly, the 24-hour waiting period protects both the rights of parents and the best interests of minors.

B. The 24-Hour Waiting Period Is Constitutional Under This Court's Decision In *Ashcroft*.

This Court has held that a state may require a pregnant teenager to obtain her parents' consent or a court order waiving the consent requirement prior to obtaining an abortion. *Ashcroft*, 462 U.S. at 490-93. Thus, *Ashcroft* held that it is permissible for the state of Missouri to require a pregnant minor to delay her abortion until she has either secured her parents' consent or has secured a court order authorizing the abortion. Either of these options will almost certainly require that the abortion be postponed for more than 24 hours. It is unlikely that parents will, upon being notified that their daughter is pregnant, immediately give their consent to her abortion and have it performed within 24 hours. Nor is it likely that any judicial proceedings would be completed within 24 hours. In fact, the Missouri bypass procedures which were upheld provided that "[a] hearing on the merits of the petition . . . shall be held as soon as possible *within five days* of the filing of the petition. . ." Mo.Rev.Stat. § 188.028.2(4) (Supp. 1982) (emphasis added); *Ashcroft*, 462 U.S. at 480. *See also T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986).

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[7] Judge Coffey describes these benefits at length in his dissenting opinion. 763 F.2d at 1548-53.

Thus, it is clear that under *Ashcroft*, Missouri can constitutionally require delays in excess of 24 hours before a minor may obtain an abortion. The Seventh Circuit, however, has held that Illinois may not require any delay whatsoever. The Seventh Circuit's decision is contrary to this Court's holding in *Ashcroft* and must be reversed. Certainly a delay of 24 hours is not undue when much longer delays have been upheld.

C. The Court Of Appeals Erred In Holding The 24-Hour Waiting Period Unconstitutional.

In striking down the 24 hour waiting period the Court of Appeals stated:

> [I]t appears that a mandatory waiting period is unconstitutional for two reasons; first, it imposes a far greater burden on a minor's rights than a parental notification requirement which provides an exception to notification for mature minors and immature minors whose best interests require an abortion, and second, it does not significantly further the state's interest in promoting parental consultation when combined with a notification requirement, which itself promotes that interest.

Zbaraz, 763 F.2d at 1538. Neither of these reasons is compelling.

It is unclear what the court meant by its first statement since § 4(c) of the Illinois parental notice law does provide for a judicial proceeding whereby a girl may avoid parental notice altogether by demonstrating that she is mature enough to make the abortion decision on her own, or that notice to her parents would not be in her best interests. The court's statement indicates either that it failed to read and understand the statute or that the court was making an independent ruling on whether § 4(a) of the law would be valid in the absence of the

bypass procedures contained in § 5 of the law.[8] In either case, the court's decision is erroneous because a 24-hour waiting period after parental notification clearly does not create a greater burden than the consent regulations upheld in *Ashcroft*.

The second reason for holding the waiting period unconstitutional is equally misguided because it is based on an erroneous assumption. Echoing its earlier opinion in *Planned Parenthood v. Pearson*, 716 F.2d 1127 (7th Cir. 1983) the court assumes that notification alone is as likely to result in parental consultation as notification with a waiting period because "'[n]otification itself in most cases should lead to parental consultation without the state's additional help. . .'" 763 F.2d at 1538, *quoting*, *Pearson*, at 1132. Based upon this erroneous assumption, the court concluded that the waiting period did not significantly further its stated purpose of furthering consultation. This reasoning, however, is unsound.

If a state is not permitted to require any waiting period after notice has been given, a doctor may fulfill his obligations under the law by notifying a girl's parents while she is undressed and on the operating table and proceed immediately with the abortion. Notification under these circumstances certainly would not "lead to parental consultation without the state's additional help." Indeed, such notification would effectively preclude any

[8] Implicit in the court's first reason for holding that the 24-hour waiting period was unconstitutional, is a determination that a judicial alternative to parental notice is constitutionally mandated. Indeed, in the course of its discussion of the constitutionality of the 24-hour waiting period, the court stated unequivocally that "a mature minor or an immature minor in whose best interest it is to have an abortion has a constitutional right to have an abortion without notifying her parents." 763 F.2d at 1536. As set forth in Part III of this brief, this Court has never held that a statute requiring only parental notice prior to the performance of an abortion upon an unemancipated minor must also provide for a judicial alternative to notice, and none is constitutionally mandated.

opportunity for consultation prior to the abortion. Thus, contrary to the court's assumption, the waiting period would significantly increase the chances of parental consultation, if for no other reason than by precluding the above scenario.

In addition to these two explicit reasons for holding the 24-hour waiting period unconstitutional, the court of appeals appears to have relied on a number of other factors, all of which are equally unpersuasive. First, the court notes that "[n]either the notification statute which the Court upheld in *Matheson* nor the parental consent statute which the Court upheld in *Ashcroft* requires a waiting period after notification or consent is effected." 763 F.2d at 1536. These facts, however, are irrelevant. Indeed, the court ignores the fact that the notice statute in *H.L. v. Matheson*, 450 U.S. 398 (1981), which failed to provide for a mandatory waiting period during which consultation would take place, was challenged on the very grounds that it did not reasonably further the asserted state interest of promoting consultation. *Matheson*, 450 U.S. at 412 ("Appellant intimates that the statute's failure . . . to provide for a mandatory period of delay after the physician notifies the parents, renders the statute unconstitutional."). This Court's refusal to hold the Utah statute unconstitutional because it *failed* to require a mandatory waiting period, in no way suggested that a statute that *required* a waiting period would be unconstitutional.[9]

Second, the court apparently based its decision in part on its assumption that the 24-hour waiting period would

[9] In addition, the Court of Appeals' reference to the fact that no waiting period was present in the Missouri parental consent statute considered in *Ashcroft* evidences the court's total misunderstanding of the rights and interests involved. The very fact that a minor has secured her parents' consent, indicates that they have had an opportunity to consult with her about the wisdom of her decision. Therefore, a waiting period would serve no purpose in that context.

increase the cost of an abortion and increase its risk. These assumptions were drawn primarily from the Court of Appeals' reasoning in *Pearson*. 763 F.2d at 1537-38. However, as Judge Coffey aptly stated in dissent:

> What the majority fails to comprehend is that the *Pearson* decision is premised upon skewed logic, a flawed legal analysis, and *a complete disregard for the parental rights involved.* * * * This court held the twenty-four hour waiting period unconstitutional because 'the same objections to waiting periods for adults listed in *City of Akron* apply to waiting periods for minors.' . . . The court's reasoning . . . leaps blindly from *Akron*, a case involving the abortion decision of mature adult women, to the completely separate and unrelated issue presented in this case; the need to protect minor[s]. . . The glaring distinguishing factor of *Akron*, however, is that the statute in that case applied to mature women of majority age and thus the State's only expressed interest in the twenty-four hour waiting requirement was to ensure that the 'woman's decision be informed.' Unlike the State's interest in *Akron* . . . the State of Illinois' interest is to protect minor unemancipated female children from their own immaturity, as well as to protect parents' constitutional right to direct the upbringing of their minor children, for whom the parents are legally responsible.

763 F.2d at 1553-54 (emphasis added).

Moreover, the Court of Appeals' basic assumptions regarding the supposed increases in cost and risks are not supported by the record or logic. The court quotes *Women's Medical Center of Providence, Inc. v. Roberts*, 530 F. Supp. 1136 (D.R.I. 1982), for the proposition that a delay of even 24 hours may push a woman into the second trimester [10] and thereby significantly increase the

[10] Although not addressed by the court, it is hard to understand how a delay of 24 hours could "push a woman into the second

cost of the procedure by requiring that the operation be performed in a hospital. 763 F.2d at 1537. The court also notes: "In Illinois a second trimester abortion also must be performed in a hospital on an inpatient basis. See 38 Ill.Rev.Stat. ¶ 81-24 § 4 (1983). [*sic*]" *Id.*, at n.1. The Illinois law requiring hospitalization for second trimester abortions, however, was repealed in 1984 due to this Court's decision in *Akron*. Ill.Rev.Stat. ch. 38, ¶ 81-24 (1985). Therefore, any reliance that the Court of Appeals placed on this "fact" was simply erroneous since there is no hospitalization requirement for any abortions performed in Illinois.

Finally, the court's concerns regarding increased risk to the minor due to the delay caused by the waiting period are misplaced.[11] 763 F.2d at 1537. A delay of 24 hours would not increase the risk of abortion "to a statistically significant degree." *Roberts*, 503 F. Supp. at 1146. And, if abortion were such a dangerous procedure that a delay of even 24 hours would substantially increase risk to the minor, there would be even more compelling reasons for requiring that parents be notified. In spite of this, the court relies on claims that the waiting period, when combined with other factors such as clinic scheduling conflicts, "*may* produce delays in excess of the 24 hours." Affidavit of Ruth Osgood at 3 (emphasis added); *Zbaraz*, 763 F.2d at 1537. There is nothing in the record to indicate that a delay of 24 hours, even in combination

trimester" when the most advanced techniques for determining fetal gestational age are incapable of accurately pinpointing the stage of fetal development to within a day. As this Court noted in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 431 n.15 (1983), "Because of the approximate nature of these [gestational] measurements, there is no certain method of delineating "trimesters.'" Given the necessary approximations involved, it is ridiculous to assert that a delay of 24 hours would "push a woman into the second trimester."

[11] The Illinois law does not require notice or a waiting period when an emergency requires an immediate abortion. Ill. Rev. Stat. ch. 38, ¶ 81-66 (1985).

with other factors, would significantly increase risk to the minor. More importantly, any such delays that might be caused by a combination of factors not created by the State, such as the private decisions of clinic operators concerning scheduling, cannot be attributed to the State's action of enacting the law.[12] *See, Blum v. Yaretsky*, 457 U.S. 991 (1982).

In sum, the Court of Appeals' basic assumptions and logic in reaching its holding regarding the 24-hour waiting period were fundamentally flawed and its decision is in conflict with this Court's decision in *Ashcroft*. Accordingly, its decision must be reversed.

III. A JUDICIAL ALTERNATIVE TO PARENTAL NOTICE IS NOT CONSTITUTIONALLY MANDATED.

A majority of the Court has never held that a state statute requiring parental notification prior to the performance of an abortion upon an unemancipated minor must also provide for a judicial alternative to parental notification. The rationale for requiring a judicial alternative when a state passes legislation requiring parental consent, thereby giving parents a veto power, is absent when the state requires only parental notification and

[12] Similarly, contrary to Appellees' additional claims, two trips to the clinic are not required by the law. The Illinois waiting period is unlike the waiting period addressed in *Akron*. In *Akron*, the waiting period followed counseling which was to be obtained at the clinic where the abortion was to be performed. Thus, the law required that the woman go to the clinic and be counseled by the doctor personally, sign a consent form and then wait 24 hours before returning to the clinic for her abortion. Here, the waiting period follows notification of parents rather than a trip to the clinic for counseling. There simply is nothing in this law which requires a minor to go twice to a clinic. When the minor calls to make her appointment, the clinic need only inform her of the Illinois law requiring notification of her parents, obtain the appropriate information from the minor, notify her parents and schedule the abortion for 24 hours later.

does not grant parents any veto power. Parents have a fundamental constitutional right to direct the upbringing of their children which, at a minimum, includes the right to be notified prior to the performance of an abortion on their teenage daughter. While their daughter's right to obtain an abortion may outweigh their right to withhold consent and thereby prevent her from obtaining an abortion altogether, it does not outweigh their right to know of the abortion and offer their advice and guidance to her during a most stressful time when she is faced with a decision of irreversible and serious consequences.

A. This Court Has Not Held That States Must Provide A Judicial Alternative To Parental Notice.

A majority of this Court has held that "relevant legal standards with respect to *parental-consent* requirements are not in dispute." *Ashcroft*, 462 U.S. at 490 (emphasis added). It is clear that a state wishing to require parental *consent* prior to the performance of an abortion on a minor also "must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests." 462 U.S. at 439-440.

A majority of this Court, however, has never held that a law requiring parental *notice* must also provide a judicial alternative to notice. The statutes at issue in *Bellotti II*, *Akron* and *Ashcroft* all involved parental consent, where a veto power was given to parents, rather than parental notice which provides for no such veto power.[13]

[13] Although much of the plurality opinion of Justice Powell in *Bellotti II* appears to equate notice and consent provisions, it is clear that a majority of that Court did not hold that notice and consent were equivalent. *See*, 443 U.S. at 654 n.1 (Stevens, J., concurring in judgment, joined by Brennan, Marshall, and Blackmun, JJ.) ("Neither *Danforth* nor this case determines the constitutionality of a statute which does no more than require notice to the parents, without affording them or any other third party an absolute

Indeed, the Court specifically noted in both *Akron* and *Ashcroft* that parental notice provisions were not at issue. In *Akron*, the Court stated: "The Court of Appeals upheld § 1870.05(A)'s notification requirement. . . . The validity of this ruling has not been challenged in this Court." 462 U.S. at 439 n.29 (citation omitted). *See also*, 462 U.S. at 469 n.12 (O'Connor, J., dissenting). Also, in *Ashcroft*, the Court stated: "The lower courts found that § 188.028's notice requirement was unconstitutional. The State has not sought review of that judgment here. Thus, in the posture in which it appears before this Court for review, § 188.028 contains no requirement for parental notification." 462 U.S. at 491 n.17 [14] (citations omitted).

H.L. v. Matheson, was the only case in which the constitutionality of a statute requiring parental notice rather than consent was before the Court. In that case, the Court expressly declined to rule on the question of whether a judicial alternative is necessary in the context of parental notice. "Members of the particular class now before us in this case have no constitutional right to notify a court in lieu of notifying their parents. This case does not require us to decide in what circumstances a state must provide alternatives to parental notification." 450 U.S. at 413 n.22 (citation omitted). *See also Matheson*, 450 U.S. at 414 (Powell, J., concurring) ("I join the opinion of the Court on the understanding that it *leaves open* the question whether § 76-7-304(2) unconstitutionally burdens the right of a mature minor or a minor whose best interest would not be served by parental notification.") (emphasis added); *Id.*, at 420-421 (Stevens,

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veto."); *Id.* at 651-52 (Rehnquist, J., concurring); *Id.* at 656-57 (White, J., dissenting) (continuing to hold his views expressed in *Danforth*).

[14] Therefore, any statements in *Akron* concerning the standards for parental "involvement" which could be construed to include parental notice are dicta. *See, Akron*, 462 U.S. at 428 n.10, 441 n.31.

J., concurring) (Court should have addressed the question of whether a State may require notification of all minor women regardless of their maturity).

Since no decision of the Court has held that a judicial alternative to parental notice is constitutionally mandated, that question remains open.

B. Parental Notice And Parental Consent Are Fundamentally Different And The Rationale For Requiring A Judicial Alternative To Parental Consent Is Absent In The Context Of Parental Notice.

There is a fundamental difference between a statute which requires parental consent prior to the performance of an abortion on a minor and one which requires only that the parents be notified prior to the abortion. A requirement of consent grants to parents "an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Planned Parenthood v. Danforth*, 428 U.S. at 74. In contrast, a notice requirement grants no veto power to the parents whatsoever. Regardless of her parents' wishes, the minor may obtain an abortion once her parents have been notified.

Accordingly, the very reason for requiring a judicial alternative to consent is lacking in the context of notice. While the judicial alternative may be necessary to protect the minor from a possibly arbitrary veto by parents which would result in the minor's having to carry her child to term, no such veto is possible under a simple notice requirement. In no case does a notice provision like that of Illinois prevent the minor from ultimately obtaining an abortion if she so desires, as would a consent provision. Thus, there is no concomitant need for a judicial alternative to notice.[15]

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[15] The fact that the Illinois law requires a 24-hour waiting period does not affect this reasoning. The waiting period is designed to

C. A Proper Balance Between the Rights of Parents and Their Minor Daughter Is Maintained Without Requiring a Judicial Alternative to Notice.

A requirement of parental notice properly balances the fundamental rights of both parents and their minor daughters. It protects the rights of parents to counsel their children on important decisions and protects minors "who often lack the ability to make fully informed choices that take account of both immediate and long-range consequences [of their decisions]," from making imprudent decisions without the benefit of their parents guidance. *Bellotti II*, 443 U.S. at 640. It does so in a manner that does not intrude upon the right of a minor to obtain an abortion for, regardless of her parents wishes, she may have the abortion after postponing her decision 24 hours.[16]

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allow parents some meaningful opportunity to consult with their daughters and merely postpones the effectuation of the minor's decision. Should the parents disagree with a decision to abort, they cannot prevent the minor from obtaining an abortion by withholding their consent. Rather, at the conclusion of the waiting period, the minor may effectuate her decision despite her parents wishes.

[16] The fact that Illinois has enacted a statute which shifts the balance more favorably toward minors by providing a judicial alternative to notification does not mean that it is constitutionally required to do so. Cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). Indeed, the Illinois statute could be challenged by parents as violating their constitutional rights.

It appears that the Illinois legislature added the bypass procedures as a safety feature in response to certain language in prior decisions of this Court which indicated that the question regarding its necessity was still open. However, as Justice Stevens noted in *Bellotti II*:

> [T]here is a certain irony in [Justice Powell's] suggestion that a statute that is intended to vindicate 'the special interest of the State in encouraging an unmarried pregnant minor to seek the advice of her parents in making the important decision whether or not to bear a child,' see *ante*, at 639, need not require notice to the parents of the minor's decision. That irony makes me wonder whether any legislature concerned with parental consultation would, in the absence of today's advisory opinion, have enacted a statute comparable to the one my Brethren have discussed.

443 U.S. at 656 n.4.

To hold that the Constitution requires a judicial alternative to parental notice would effectively nullify the fundamental right of parents to have a guiding role in the upbringing of their children. It is virtually impossible for parents to exercise their rights and fulfill their responsibilities regarding the upbringing of their children when those children are spirited away and convinced to have abortions without notifying their parents.[17] At a minimum, parents have a right to be notified when their

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[17] A case currently in litigation in California is illustrative of this concern. In *Preston v. Thermalito School District, et al.*, No. 89930 (Butte County, California Superior Court filed Mar. 24, 1986, refiled Dec. 15, 1986), a junior high school teacher, through a course of deceptive conduct, arranged for an abortion for a 14 year old immature and unemancipated minor student without notifying the child's parents, despite the fact that the mother had personally visited the school principal to request that she, through a system of "daily reports," be kept apprised of all matters relating to her daughter.

The facts allege that despite the mother's explicit plea to be so informed, the daily reports were manipulated by the school in an effort to conceal the fact that the minor had been excused from school on several occasions relative to the abortion, including trips to arrange public welfare payment for the abortion and for a pregnancy test, for which the teacher personally paid. In addition, the teacher sent the mother a note seeking permission for the girl to babysit at the teacher's home, when in fact the teacher planned to transport the minor to have the abortion. The teacher remained in the operating room during the abortion procedure. The arrangements for the abortion were allegedly made with the knowledge and approval of the school principal, school superintendent, school nurse and other teachers.

The mother eventually learned of the deception and the abortion four days later when summoned to the hospital emergency room where her minor daughter was undergoing emergency surgery for post-abortion complications.

children are in stressful circumstances and faced with decisions having irreversible and grave consequences.

Since the reasons for requiring a judicial alternative to parental consent are lacking in the context of parental notice, and such a requirement may violate the fundamental right of parents to have a guiding role in the upbringing of their children, it is not constitutionally mandated.[18]

CONCLUSION

For the foregoing reasons, the Court should review the merits of the 24-hour waiting period and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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[18] The opinion of Justice Stevens in *H.L. v. Matheson*, cogently argues that no judicial alternative is constitutionally mandated in the context of a parental notice statute. *See, Matheson*, 450 at 420-425.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
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No. 85-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, *et al.*,

Appellants,

v.

DAVID ZBARAZ, M.D., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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No. 85-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, *et al.*,

Appellants,

v.

DAVID ZBARAZ, M.D. *et al.*,

Appellees.

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a civil rights organization which is national in membership. One of the League's strongest interests has been the defense of parents' rights to direct the upbringing of their children. The League's concern for parental rights has been evident in litigation it has supported, *see Doe v. Irwin*, 615 F.2nd 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980), and amicus curiae briefs it has filed. *See Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 106 S. Ct. 2718 (1986), *Sheridan Road Baptist Church v. State*, ___ Mich. ___, ___ N.W.2d ___ (November 24, 1986) (No.

73665). The League's brief in this matter serves the League's interests in preserving parental rights by attempting to insure that these constitutionally recognized rights are given appropriate weight in the context of a minor child's abortion decision. The League has obtained written permission to file this brief from the counsels of record for the parties in this case. These letters have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

In his dissenting opinion below, Judge Coffey correctly observed that the decision of the court of appeals panel majority "fails to protect the constitutional right of parents to direct, supervise, and properly control the rearing of their minor children." *Zbaraz v. Hartigan*, 763 F.2d 1532, 1546 (7th Cir. 1985), *jurisdiction postponed*, 55 U.S.L.W. 3257 (U.S. October 14, 1986) (No. 85-673) (Coffey, J., dissenting). This Court has long recognized that the United States Constitution provides parents with the primary right to direct the upbringing of their children. *See, e.g., H.L. v. Matheson*, 410 U.S. 398, 410 (1981); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 637-638 (1979) (plurality opinion). As part of this constitutionally protected right, parents ordinarily must be permitted the opportunity to counsel their children on important decisions, such as the decision about abortion. *See Matheson*, 450 U.S. at 410.

Parental rights are not to be lightly disregarded. Indeed, a strong argument could be made that a state regulatory framework permitting a minor child an unqualified right to have an abortion without parental consultation would violate constitutionally protected parental rights in the same fashion that state regulation permitting an absolute parental veto of a minor child's abortion is said to violate the minor's right to decide about an abortion. *Cf. Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976). However, this Court need not address this issue in this case because the question here is only whether the state can aid parents' exercise of their constitutionally protected right to involvement in their minor child's abortion decision.

In addressing the constitutionality of the Illinois twenty-four hour post-parental notification waiting period for minor's abortions, it is important to remember that parental rights and abortion decisional rights are said to share a common constitutional foundation, the Due Process Clause of the Fourteenth Amendment. This fact would appear to require the conclusion that both rights can be compatibly exercised if both are legitimate subjects of constitutional protection. As a plurality of this Court has recognized: "Properly understood . . . the traditional parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter." *Bellotti II*, 443 U.S. at 638 (plurality opinion).

Viewing parental rights and abortion decisional rights in this manner, it is clear that the Illinois post-parental notification waiting period for minors' abortions aids the exercise of both rights. The waiting period assists the minor's right to make a decision about the abortion and her parents' rights to be involved in her important decision by encouraging parental consultation about the abortion decision. An abortion decision is a very important choice affecting a minor child's mental, physical and spiritual well-being. Sympathetic guidance is most important in making this decision. In the case of a minor child, parental consultation may be the most significant aid to her right to make a decision about abortion. Thus, this Court has recognized the permissibility of parental notification statutes in most circumstances as a means to stimulate this parental consultation. *See Matheson*.

The waiting period found in the Illinois statute is virtually indispensable to guaranteeing the proper parental consultation about a minor child's abortion which a parental notification statute stimulates. Unless some amount of time is guaranteed between notification and abortion, a parental notification requirement becomes little more than a "squeal" rule, failing to insure the parental consultation necessary to protect either parents' rights or a minor child's decisional rights in the context of abortion.

While the waiting period is necessary to guaranteeing

parental consultation, the reasons utilized by the court of appeals to invalidate it were little more than a "parade of horribles." Simple common sense would dictate that the reasons proffered by the court are insufficient to overcome even the harm to a minor child's right to make a decision about abortion which would result from deprivation of parental consultation, let alone the severe damage to parental rights which would result from such a holding. Accordingly, the court of appeals erred when it invalidated the waiting period established by the Illinois statute.

ARGUMENT

AN ANALYSIS PROVIDING PROPER WEIGHT TO PARENTAL RIGHTS REVEALS THAT ILLINOIS' EFFORTS TO PROTECT THOSE RIGHTS BY MEANS OF A TWENTY-FOUR HOUR POST-PARENTAL NOTIFICATION WAITING PERIOD FOR A MINOR CHILD'S ABORTION DOES NOT BURDEN A MINOR CHILD'S RIGHT TO MAKE A DECISION ABOUT ABORTION.

A. Unlike the Court of Appeals, This Court Must Adequately Consider Constitutionally Protected Parental Rights in its Analysis of the Constitutionality of a Twenty-Four Hour Post-Parental Notification Waiting Period for a Minor Child's Abortion.

Near the beginning of his dissenting opinion below Judge Coffey pointed out the basic problem underlying the court of appeals panel majority's invalidation of Illinois' twenty-four hour post-parental notification waiting period for a minor child's abortion. Judge Coffey stated:

> I dissent because the majority's holding not only fails to protect the minor unemancipated child from making an uninformed, immature abortion decision but also fails to protect the constitutional right of parents to direct, supervise, and properly control the rearing of their minor children.

Zbaraz v. Hartigan, 763 F2d 1532, 1546 (7th Cir. 1986), *jurisdiction postponed*, 55 U.S.L.W.3257 (U.S. October 14, 1986) (No. 85-673) (Coffey, J., dissenting).

Judge Coffey clearly grasped what the majority of the court of appeals panel missed: the fact that parents enjoy privacy-based, constitutional rights regarding their minor children's abortion decisions which must be protected just as vigilantly as their minor children's right to decide about having an abortion.

In recognizing this truth the dissenting Judge was clearly in harmony with this Court's pronouncements concerning parents' rights to direct their children's upbringing. For example, in *Parham v. J.R.*, 442 U.S. 584, 602 (1979), this Court explained the historical and philosophical foundations of its decisions affording parental rights' constitutional protection:

> Our jurisprudence has reflected Western civilization concepts of the family as a unit with a broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More importantly, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

(citations omitted).

This Court has found that constitutionally recognized parental rights must be protected in cases in which a minor child contemplates having an abortion. In *H.L. v. Matheson*, 450 U.S. 398, 410 (1981), the Court summarized the precedents supporting a constitutional right for parents to involvement in their child's abortion decision:

> "[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is bas-

ic to the structure of our society." *Ginsberg v. New York,* 390 U.S. 629, 639, (1968). In *Quilloin v. Walcott,* 434 U.S. 246, (1978), the Court expanded on this theme:

> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. *See, e.g., Wisconsin v. Yoder,* 406 U.S. 205, 231-233, (1972); *Stanley v. Illinois,* 405 U.S. 645, (1972); *Meyer v. Nebraska,* 262 U.S. 390, 399-401, (1923). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.,* at 255, quoting *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

See also Parham v. J.R., 442 U.S. 584, 602, (1979); *Pierce v. Society of Sisters,* 268 U.S. 510, 535, (1925). We have recognized that parents have an important "guiding role to play in the upbringing of their children, *Bellotti II,* 443 U.S., at 633-639, which presumptively includes counseling them on important decisions.

A plurality of this Court in *Bellotti v. Baird (Bellotti II),* 443 U.S. 622, 637-638 (1979), explained the policies underlying this Court's determinations that constitutionally protected parental rights ordinarily include the right to involvement in a child's important decisions, such as those involving abortion:

> "The duty to prepare the child for 'additional obligations' . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder,* 406 U.S. 205, 233 (1972). This affirmative process of teaching, guiding and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.

> We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the state *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice. Thus "[i]t is cardinal with us that the custody, care and nuture of the child reside first in the parents, whose primary function and freedom include *preparation for obligations the state can neither provide nor hinder." Prince v. Massachusetts,* [321 U.S. 158, 166], (1944) (emphasis added).

(emphasis in original). These precedents establish a clear right for parents ordinarily to be notified and involved in their children's decisions about abortion, except in situations in which the child can prove to an independent judicial decisionmaker that she has the maturity to make an independent abortion decision or that notification otherwise would not be in her best interest. *See Matheson,* 450 U.S. at 420 (Powell, J., concurring).

Parental rights to involvement in their minor children's abortion decisions are not to be lightly disregarded. Indeed, an argument could be made that the State impinges upon constitutionally protected parental rights to guide their children's important decisions in those cases in which it allows a minor to make an abortion decision without parental notification when the minor lacks sufficient maturity to make this type of decision and there are not adequate reasons for refusing to involve the parent. Certainly, if a state regulatory framework allowing parents an absolute veto over a minor child's constitutionally protected abortion decision is invalid,[1] it would seem just as clear that a state regulatory framework permitting minors an absolute right to have abortions, without affording parents meaningful notice and an opportunity to be involved in the minor child's decision, would vio-

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[1] *See Planned Parenthood v. Danforth,* 428 U.S. 52, 72-75 (1976).

late constitutionally protected parental rights. As dissenting Judge Coffey noted below: "An essential component of the parents' right to direct the rearing of their children is the opportunity to participate in their daughter's important decisions, including the choice of whether or not to undergo an abortion procedure." 763 F2d at 1551 (Coffey, J., dissenting). It might well be that the Constitution would require a right to parental involvement in a minor child's abortion decision to be implied in jurisdictions where such a right is not currently recognized.

This Court, however, need not decide this issue. The question here is only whether the State can aid parents' exercise of their constitutionally protected rights to involvement in their minor children's abortion decisions by means of a twenty-four hour post-parental notification waiting period before an abortion can be performed. As will be seen the reasoning underlying both constitutionally protected parental rights and abortion decisional rights indicates that these rights can be compatibly exercised and that the twenty-four hour post-parental notification waiting period is a permissible state attempt to facilitate the exercise of both rights.

B. The Reasoning Underlying the Recognition of Both the Parental Right to Direct a Child's Upbringing and the Right to Decide About Having an Abortion Would Appear to Require Efforts to Make the Exercise of these Rights Compatible.

This case involves the interaction between parents' rights to direct their child's upbringing and their child's right to decide about having an abortion. Courts sometimes approach these rights as if they were in tension. However, the reasoning underlying the recognition of constitutional protection for these two rights would point toward their compatibility if, in fact, the two rights are both legitimate subjects of constitutional protection.

A parent's right to direct a child's upbringing is one of the earliest non-economic rights to have been recognized by this Court as part of the "privacy" right inhering in the Constitution's Due Process Clause. *See Pierce v. Society of Sisters,* 268, U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). Indeed, the cases which found parental rights constitutionally protected were prominently cited as support for recognition of a right to decide about abortion in the case which determined that this right also inhered in the Constitution's Due Process Clause. *See Roe v. Wade,* 410 U.S. 113, 152, 153 (1973).

The common foundation of parental rights and abortion decisional rights would indicate that if both rights legitimately inhere in the Constitution, efforts should be made to reconcile their exercise with one another. Certainly if the exercise of one right is inconsistent with the exercise of the other, this could be strong evidence that the more recently found right, the right to abortion, does not truly enjoy the constitutional status long ago attached to its more venerable constitutional counterpart, parental rights.[2] However, if the Court has correctly discerned that the Constitution protects a child's right to have an abortion, it would seem that special efforts should be made to insure that state regulations governing the exercise of that right also respect her parents' rights to direct her upbringing in the same fashion that they protect her right to decide about having an abortion.

If parental rights and abortion decisional rights truly have the same root, it would not seem difficult to reconcile their exercise. Indeed, this Court has recognized that the exercise of parental rights will normally insure that other individual liberties, such as the right to make an abortion

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[2] Indeed, amicus curiae submits that a careful examination of the right to decide about abortion will reveal that the abortion right is neither part of our nation's history and tradition nor fundamental to ordered liberty and, thus, is not a legitimate subject of constitutional protection. *See Thornburgh v. American College of Obstetricians and Gynecologists,* 106 S. Ct. 2169, 2193-2196, (1986) (White, J., dissenting). However, the issue of the legitimacy of a constitutional right to make a decision about abortion is not stated as one to be determined by the Court in this case. Accordingly, amicus curiae will proceed on the assumption that the Court will continue to recognize a "privacy" right to decide about abortion.

decision, are properly exercised. In the plurality opinion in *Bellotti II*, 443 U.S. at 638-639, four members of this Court stated:

> Properly understood . . . the traditional parental authority is not inconsistent with our tradition of individual liberties; rather, the former is one of the basic presuppositions of the latter. Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding. Under the Constitution, the State can "properly conclude that parents and others, teachers for example, who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." *Ginsberg*, 390 U.S. at 639.

(footnotes omitted, citation shortened).

As will be seen, when the Illinois statute is viewed in a manner which gives the same degree of respect to "privacy" based parental rights as is given to "privacy" based abortion decisional rights, the conclusion is inescapable that the Illinois law furthers, rather than impedes, the exercise of both these "privacy" rights.

C. The Twenty-Four Hour Waiting Period Established by the Illinois Statute is Necessary to the Effective Exercise of Constitutionally Protected Parental Rights and Aids, Rather than Impedes, the Right of a Minor Child to Decide About Abortion.

The twenty-four hour post-parental notification waiting period for a minor child's abortion is a constitutionally proper measure necessary for the protection of constitutionally guaranteed parental rights, and assists, rather than impedes, a minor child's exercise of her right to decide about having an abortion.

Initially, it is possible to quickly dispose of the argument that this case is controlled by the Court's invalidation of a

twenty-four hour waiting period for adult women's abortions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 449-451 (1983). While *Akron* found no legitimate State interest served by the adult waiting period, the statute involved in this matter serves the State's interest in insuring that minor children reach abortion decisions maturely. Further, it is virtually indispensable to the advancement of the State's interest in protecting constitutionally based parental rights to be involved in their minor child's abortion decision.

Focusing more closely on how the twenty-four hour waiting period advances State interests in protecting each of these sets of rights, it is almost self-evident that its role in encouraging consultation between parent and child about the minor child's abortion decision advances parents' rights to involvement in their child's important decisions. Such consultation is a fundamental component of parents' constitutional rights to direct their children's upbringing. However, it also is clear that the minor child's right to decide about abortion is aided rather than impeded by the twenty-four hour waiting period. The minor child's right in this matter is the right to make a decision about *whether or not* to have an abortion. *See Roe*, 410 U.S. at 153. The mere fact that a State regulation may decrease the number of abortions obtained by women freely making a decision about having an abortion does not mean that the ability to decide whether to have an abortion is impeded. *See Matheson*, 450 U.S. at 413. Instead, it is necessary to determine whether the involved statute aids or impedes the minor child's ability to *make a decision* about abortion.

A careful examination of the nature of the abortion decision clearly indicates why encouraging parental consultation furthers, rather than restricts, the minor's right to decide about abortion as well as her parents' right to be involved in her important decision. In his concurring opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169, 2189 (1986) (Stevens, J. concurring), Justice Stevens recently described the abortion decision as "a difficult

choice having serious and personal consequences of major importance to [the women's] own future -- perhaps to the salvation of her immortal soul." This powerful description of the important character of the decision about abortion is one which few on either side of the abortion controversy could disagree.[3]

Because the decision about abortion is such an important matter, exercise of this right presupposes that women contemplating abortion be free to seek "sympathetic guidance" from others in making this decision. *See Thornburgh,* 106 S. Ct. at 2189 (Stevens, J. concurring). In the case of a minor child, perhaps the most important sources of necessary guidance in the decision about an abortion are her parents.

This Court's cases have long recognized the importance of parental consultation to a minor child's abortion decision. In *Parham,* 442 U.S. at 603-604, this Court indicated how minor children were unprepared to make any medical decision, much less as significant a decision as one concerning an abortion. Explaining why our society traditionally allows parents to make these decisions for minors, this Court noted:

> Most children, even in adolescence, simply are not able to make sound judgements concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments. Here, there is no finding by the District Court of even a single instance of bad faith by any parent or any member of appellees' class. We cannot assume that the result in *Meyer v. Nebraska* and *Pierce v. Society of Sisters* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about parental refusal to provide cosmetic surgery does not diminish the par-

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[3] Indeed, the terrible significance of the abortion decision is certainly one of the reasons why many feel the abortion decision cannot be left to individual determination.

ent's authority to decide what is best for the child.[4]

The difficulty a minor child generally would have in making a medical decision is aggravated in the case of an abortion decision which carries significance far beyond the simple medical considerations involved. *See Thornburgh* 106 S. Ct. at 2187, 2189-2190 (Stevens, J., concurring); *Bellotti II,* 443 U.S. at 640 (plurality opinion); *Planned Parenthood v. Danforth,* 428 U.S. 52, 102-103 (Stevens, J., concurring and dissenting). The significance of the abortion decision to a minor and her normal need for parental consultation in making this decision were noted by this Court in *Matheson,* 450 U.S. at 409, in which the Court approvingly quoted the following language from the plurality opinion in *Bellotti II,* 443 U.S. at 640 (plurality opinion):

> [P]arental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions. As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and often in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision--one that for some people raises profound moral and religious concerns.

(footnotes omitted). The *Matheson* Court also approvingly quoted Justice Stewart's concurring opinion several years earlier in *Danforth,* 428 U.S. at 91 (Stewart, J., concurring), in which Justice Stewart noted the need for a child to ob-

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[4] (citations omitted). This statement, of course would not permit a state statutory scheme in which a parent was allowed absolute authority to compel a child to have an abortion. The state grant of such an absolute right to a parent would violate the child's constitutionally guaranteed right to bear a child. *Cf. Planned Parenthood v. Danforth,* 428 U.S. 52, 72-75 (1976) (state statutory scheme allowing absolute parental veto of minor child's abortion violates child's constitutionally guaranteed right to make a decision about an abortion).

tain parental consultation in making the abortion decision and the unlikelihood that counsel and support could be afforded to the child by the abortionist:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried, pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Matheson, 450 U.S. at 409-410 (quoting *Bellotti II*, 443 U.S. at 640-641 (plurality opinion), quoting, in turn, *Danforth*, 428 U.S. at 91 (Stewart, J., concurring)) (footnote omitted in the original of both cases which quote original case).

The specific manner in which the parental consultation noted in this Court's decisions can play a helpful role in aiding a minor child's exercise of her right to make an abortion decision was carefully laid out by Judge Coffey in his dissenting opinion below. *See* 763 F.2d at 1549-1551 (Coffey, J., dissenting). In these extensive passages Judge Coffey thoroughly explained the very serious physical, psychological and spiritual aspects of an abortion decision and the useful guidance which parental consultation can provide to a minor child in considering these factors. A thoughtful examination of these passages will clearly confirm the wisdom of this Court's general pronouncements concerning the importance of parental consultation in a minor child's abortion decisions.

The valuable role of parental consultation in vindicating both a minor child's right to decide about abortion and her parents' independent rights to be involved in that decision, justify State requirements of parental notification of a minor's impending abortion, except in the rare cases of a mature minor or of indications that an abortion without parental notification is in the child's best interest. *See Matheson, Bellotti II,* 443 U.S. at 647-648 (plurality opinion). This Court's decisions recognizing the legitimacy of parental notification requirements reflect the fact that parental notification may be necessary to avoid situations in which impressionable young women impulsively undergo abortions without informing their parents as a quick solution to the perceived problems occasioned by their pregnancy. As dissenting Judge Coffey noted below: "All too often minor female children find themselves trapped on an 'abortion treadmill,' inundated with opinions from peers and boyfriends to proceed immediately with the 'quick fix' abortion procedure." 763 F.2d at 1552 (Coffey, J., dissenting). A parental notification statute is a step toward permitting the parental consultation which can avoid these results. Along the same lines, parental notification also may be absolutely necessary to insuring parental consultation in the common case in which a child has exaggerated fears of adverse parental reaction to her pregnancy and desires an abortion without parental involvement as the "quick fix" for avoiding parental knowledge of her condition. Justice Stevens spoke to this situation in a case dealing with a parental consent law, with reasonable observations which are just as applicable to the less intrusive, constitutionally permissible requirements geared to stimulate parental consultation which are found in this case:

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without even informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to fur-

> ther a selfish interest rather than the child's interest. A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental consent requirement is an appropriate method of giving the parent an opportunity to foster that welfare by helping a pregnant, distressed child to make and to implement a correct decision.

Danforth, 428 U.S. at 103-104 (Stevens, J., concurring and dissenting).

Obviously a general requirement of parental notification as a necessary means to induce parental consultation concerning a minor child's abortion decision benefits both the exercise of parents' rights and a minor child's rights in the context of the abortion decision. Indeed, even the court of appeals majority recognized the clearly constitutional character of a simple parental notification requirement. *See* 763 F.2d at 1537-1538. The question presented in this case, however, is whether the further measure of a twenty-four hour post-parental notification waiting period is also necessary to the advancement of the interest in parental consultation. The court of appeals panel concluded that the waiting period was "unconstitutional for two reasons; first it imposes a far greater burden on a minor's rights than a parental notification requirement which provides an exception to notification for mature minors and immature minors whose best interests require an abortion, and second, it does not significantly further the state's interest in promoting parental consultation when combined with a notification requirement, which itself promotes that interest."[5] The application of this Court's precedent favoring parental consultation, together

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[5] 763 F2d at 1538. In support of both these conclusions the court of appeals apparently was relying upon its decision in *Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983), in which it had stated that "[n]otification itself in most cases should lead to parental consultation without the state's additional help because minors are particularly susceptible to parental wishes."

with simple common sense, results in the necessary conclusion that the court of appeals is clearly wrong on both points.

The waiting period is virtually indispensable to guaranteeing proper parental consultation in a minor child's decision concerning abortion. In his dissent below Judge Coffey explained why the mandatory twenty-four hour waiting period was "the only feasible way for a State to protect minor unemancipated children from their own immaturity and lack of experienced judgement in the affairs of life, as well as to protect the constitutional right of parents to direct the rearing of their children." 763 F.2d at 1555 (Coffey, J., dissenting). Judge Coffey specifically pointed out why the majority was mistaken in its assumption that "[n]otification itself in most cases should lead to parental consultation without the State's additional help because minors are particularly susceptible to parental wishes." 763 F2d at 1538 (quoting *Indiana Planned Parenthood Affiliates Association v. Pearson*, 716 F.2d 1127, 1143 (7th Cir. 1983)). Judge Coffey noted:

> The State is required to protect the interests of parents and their children, not blithely leave it to chance that a particular minor child will be "susceptible to parental wishes." I further note that parental notification itself, without a waiting period, neither allows nor assures parents an opportunity to analyze and discuss with their minor daughter the multitude of factors one should consider when deciding whether or not to abort a pregnancy. According to the terms of the notification statute, the surgeon need only notify the parents of their daughter's decision to abort her pregnancy and, having fulfilled this legal obligation, the surgeon can proceed immediately with the abortion, never allowing the parents an opportunity to participate in the decision. Such a result is legally, morally, and socially insupportable when one considers that the parents are not only legally responsible for the well-being and financial obligations of their minor daughter, before, during, and after the abortion, but have a constitutional right to supervise,

direct, and control their daughter's upbringing.
763 F.2d at 1555 (Coffey, J., dissenting).

Judge Coffey's views on this point appear supported by the observations of Justice Stewart in *Danforth,* 428 U.S. at 91 (Stewart, J., concurring), which a plurality of this Court quoted approvingly in *Bellotti II,* 443 U.S. at 640-641 and which a majority of this Court quoted approvingly in *Matheson,* 450 U.S. at 409-410. This language appears at page 14 *supra,* and its truth would appear self-evident. A minor child will not likely receive the type of necessary support she receives from parental consultation in the context of her brief engagement with members of the abortion industry. It is also self-evident that parental consultation, by its very nature, requires that the parent and child have some amount of time between notification and abortion to engage in the necessary consultation if this consultation is to have any real effect. A statute calling for parental notification without insuring some time for consultation does little to guarantee that the parental consultation, which forms the entire basis for a parental notification requirement, will even be able to take place. In such a situation the parental notification requirement becomes little more than a "squeal" rule, failing to insure the parental consultation necessary to protect either parents' rights or a minor child's decisional rights in the context of abortion.[6]

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[6] In fact, the party challenging the parental notification statute in *Matheson* alleged that the statute in that case was unconstitutional because it did *not* provide for a waiting period between parental notification and a minor's abortion. *See* 450 U.S. at 412. Apparently, the party challenging the statute felt that such a waiting period would be necessary for the parental notification to serve the State's interests in parental consultation. Although the *Matheson* Court correctly determined that a State need not require a waiting period in order for the statute to further its purpose of "enhancing the potential for parental consultation" there was nothing to suggest that such a waiting period was unconstitutional. Indeed, the neutral citation of five waiting period statutes by the Court would point toward a likelihood of constitutionality. *See* 450 U.S. at 412 n. 21. However, the significant fact to be extracted from this passage is that even those who challenge parental consultation statutes recognize the importance a brief waiting period can have in insuring effective parental consultation.

While the twenty-four hour post-parental notification waiting period for minor children's abortions is virtually indispensable to guaranteeing the productive parental consultation necessary to protect both parents' rights and minors' rights to decide about abortion, the claim that the requirement impinges upon the abortion right was supported in the flimsiest manner possible. The Court of Appeals majority appeared to rely upon a "parade of horribles" suggesting that doctors might become unavailable, abortions might become less safe or more expensive, mental anguish might result or someone in an area of sparse population might have to make a 400-mile trip for an abortion. *See* 763 F.2d at 1537. An honest, common-sense based evaluation of these reasons results in the necessary conclusion that these reasons are not even sufficient to overcome the harm to a minor child's right to make a rational, informed decision on abortion matters which can result from lack of parental consultation, let alone the harm resulting to parental rights to be involved in their child's abortion decision which would occur if parental consultation was not guaranteed by a twenty-four hour post-notification waiting period. Dissenting Judge Coffey accurately summarized the fallaciousness of the Court of Appeals majority's findings of harm when he noted:

> According to the majority, a twenty-four hour delay could, hypothetically, result in a week-long delay depending upon the scheduling calendar of the doctor, the minor unemancipated child, and the abortion facility. So too, it is conceivable that a power outage, an automobile breakdown, or an illness to the physician could result in a week-long delay. Based upon sheer conjecture, the majority mistakenly concludes that the speculative scheduling conflicts that may be imposed upon a minor child by the twenty-four hour waiting period outweigh the child's need to make a mature, informed, well-reasoned abortion decision as well as the parent's constitutional right to participate in that decision.

763 F.2d at 1553 (Coffey, J., dissenting).

Very clearly, the twenty-four hour post-parental notification waiting period for minor children's abortions instituted by the Illinois statute is indispensable to insuring the parental consultation necessary to protect both constitutionally guaranteed parental rights to be involved in their child's important abortion decision and the minor child's right to make a decision about abortion. Conversely, this requirement, especially when accompanied by a judicial bypass provision, imposes virtually no burden upon the minor child's right to make a decision about abortion. Accordingly, the twenty-four hour waiting period is constitutional.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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No. 85-673

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Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, *et al.*,

Appellants,

v.

DAVID ZBARAZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN LIFE LEAGUE, INC., AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

The American Life League, Inc., is a pro life organization national in membership dedicated to developing national policies in the defense of human life from fertilization to death. The League is headquartered in Stafford, Virginia and conducts research and educational programs aimed at informing American citizens of their God given right to life and of their need to defend that right. The League has received permission from the appellants and appellees to file a brief amicus curiae in support of the appellants in *Hartigan v. Zbaraz,* Supreme Court Docket No. 85-673, which permissions have been filed with the Clerk of the U.S. Supreme Court.

SUMMARY OF ARGUMENT

A. The Illinois Act regulating abortions on unemancipated minors and incompetents is constitutional within the parameters of *Roe v. Wade* and subsequent cases (assuming *arguendo* the validity of the *Abortion Cases*) because in choices involving unemancipated minors and abortion, the parental relationship outweighs the abortionists' interests and business convenience.

B. *Roe v. Wade* is itself unconstitutional and should be overruled for the reason that the unborn child is a person. In reality, there is an absolute correspondence between humanity and personhood, and law must reflect this fact to be legitimate. The Declaration of Independence informs the letter of the Constitution which is based on the natural law. The right to life is self-evident and antecedent to all rights. Therefore, the unborn child is a person under the Fifth and Fourteenth Amendments to the U.S. Constitution whose right to life is thereby protected through the Due Process Clause guarantees. The failure of American society to live up to these requirements and rid itself of a moral evil eroding its foundations and bringing ruin is a reflection of pride and folly.

ARGUMENT

A. Within the parameters of the *Abortion Cases* and assuming arguendo the legitimacy of *Roe v. Wade*, the Illinois Act regulating abortions on unemancipated minors and incompetents is constitutional.

Hopefully there are some legal rules and doctrines "safe from *ad hoc* nullification by this Court when an occasion of its application arises in a case involving state regulation of abortion," *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169, 2206 (1986) (O'Connor, J., with Rehnquist, J., dissenting). If such is the case the

Illinois Act will be upheld.

The legal analysis of Judge Coffey of the United States Court of Appeals, Seventh Circuit in the case below, *Zbaraz v. Hartigan*, 763 F.2d 1532, 1542 (1985), sets out prudentially and fully why the Illinois Act should be within the standards of abortion legislation enacted by this Court as Platonic guardians of such efforts. Presumably, parental concern will be given preference over abortionists' schedules even if the unborn child is still denied a right to privacy and a right to life. *Roe v. Wade*, 410 U.S. 113 (1973).

There is a surrealism in the nature of this case. Under discussion is the "constitutionality" of a waiting period before the killing of an innocent human life by abortion. One would be remiss as a friend of the Court if the obvious truth were not put before the Court as plainly as humanly possible whenever the opportunity presents itself that *Roe v. Wade* is basically illegitimate and unconstitutional.

B. *Roe v. Wade* and all statutes and cases assuming its legitimacy are unconstitutional because the deliberate authorization by court or legislature of the execution of innocent human beings (who, of course, are persons) is in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, and that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men. ." Declaration of Independence.

Humans at times have selfishly excluded from their family different classifications of themselves, but the Declaration's, in Abraham Lincoln's words, "majestic interpretation of the economy of the universe" holds forth a standard of the

right to life of each of us under God. Its statement is generous and the Fifth and Fourteenth Amendments to the United States Constitution seek to codify this majestic interpretation. These amendments provide that no person shall be deprived of ". . .life, liberty, or property without due process of law."

This Court has noted the higher natural law claims and authority of fundamental rights.

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
>
> *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 638 (1943).

Nor should such a right to life depend upon a court majority. Lynching is democratic in that the majority votes to kill the one, but whether the robes covering the voters are white or black, there is never any legitimacy in such an edict. Judge Thomas M. Cooley, the distinguished jurist of the Michigan Supreme Court, in his treatise, *Constitutional Limitations* 133 (1972), listed as one of the principles to serve as a guideline for constitutional interpretation, the rule that the U.S. Constitution be read in conjunction with the Declaration of Independence. The Court has expressed agreement with such a canon in *Gulf, Colorado and Santa Fe Railway Co. v. Ellis,* 165 U.S. 150, 159-60 (1897), stating ". . .it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." *Id.* at 160.

In *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857), the Declaration of Independence was considered and perverted by the majority to obtain a result favorable to slavers. In *Roe v. Wade* the Declaration of Independence was ignored by the majority to obtain a result favorable to the abortionists.

Subsequently in public debate and discussion the Declaration of Independence served as a basis for resistance to the *Dred Scott Case* (the Lincoln-Douglas debates) and now it is again serving as a basis for resistance to *Roe v. Wade* (the right to life movement). Neither *Dred Scott* nor *Roe* has been overruled or expressly repudiated by the Court itself, thus far. If not overruled, *Roe,* like *Dred Scott,* will be overthrown. Events usually overtake such horrific rulings and if fortunate a society survives through suffering.

> If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offense came, shall we discern there any departure from those divine attributes which the believers in the Living God always ascribed to Him?
>
> Abraham Lincoln, Second Inaugural 1865, VIII *The Collected Works of Abraham Lincoln* 333 (R. Basler ed. 1953).

Abraham Lincoln lived in the time of wrath which Thomas Jefferson, seeing slavery for what it was, feared in his day and sensed on the horizon. "Indeed I tremble for my country when I reflect that God is just: that his justice cannot sleep forever. . ." Thomas Jefferson, Query XVIII, *Notes on the State of Virginia* 152 (W. Peden ed. 1972). As this nation of the free answered for its enslaving of black human beings, this nation of the unwanted will also answer for its murdering of unborn human beings unless there is repentance and amendment.

There is an absolute correspondence between humanity and personhood in a civilized society. The present failure of our law to fully recognize this fact is only another indication of

the current barbarism known as modernity. Yet, such a failure in American society, no matter how understandable in view of the human condition, is still in violation of the vision of America as shown in the Declaration of Independence and of the basic law itself, the U.S. Constitution.

> Careful research of the history of the Thirteenth and Fourteenth Amendments will demonstrate to any impartial investigator that the principal, actual purpose of their framers was to prevent any court, and especially the Supreme Court of the United States because of its earlier performance in the *Dred Scott* case. . .from ever again defining the concept of person so as to exclude any class of human beings from the protection of the Constitution and the safeguards it established for the fundamental rights of human beings, including. . .the unborn from the time of their conception. The precise purpose of Congress in submitting the Thirteenth and Fourteenth Amendments was to establish that the concept of "human being" and "person" were one in the same concept rather than different concepts. . .It was their purpose to establish a new definition of person consonant with biological reality or nature and common sense so as to comprehend all human beings.
>
> Testimony before the House Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 2nd Sess. 17 (1976) (Professor Joseph P. Witherspoon, University of Texas Law School).

The unborn child is a person protected under the Fifth and Fourteenth Amendments to the U.S. Constitution if those amendments have any meaning.

> Rights [referring specifically to the right of privacy], the provision of which is only implied or deduced, must inevitably fall in conflict with the express provisions

> of the Fifth and Fourteenth Amendments that no person shall be deprived of life without due process of law. The difference between this case and *Griswold* is clearly apparent, for here there is an embryo or fetus incapable of protecting itself. There, the only two lives were those of two competent adults.
>
> *Steinberg v. Brown*, 321 F. Supp. 741, 746 (N.D. Ohio 1970).

Roe v. Wade, 410 U.S. at 157-58, sees the alleged absence of a case holding the fetus to be a person under the Fourteenth Amendment as supporting its assertion that "person" in the Fourteenth Amendment ". . .does not include the unborn." But *Steinberg v. Brown* is such a case that recognizes the embryo or fetus as protected by the Fifth and Fourteenth Amendment to the U.S. Constitution. *Steinberg* is cited in *Roe v. Wade*, 410 U.S. at 155, as an example of a case which upheld an anti-abortion law.

Why was *Steinberg*, decided in 1970, not also cited as a holding of personhood for the fetus under the Fifth and Fourteenth Amendment? A 1970 editorial in *California Medicine* answers this question and explains in part as well why *Roe v. Wade* is so illogical and non-legal in its reasoning and wording.

> The traditional Western ethic has always placed great emphasis on the intrinsic worth and equal value of every human life regardless of its stage or condition. This ethic has been the blessing of the Judeo - Christian heritage and has been the basis for most of our laws and much of our social policy. The reverence for each and every human life has also been a keystone of Western medicine and is the ethic which has caused physicians to try to preserve, protect, repair, prolong, and enhance every human life which comes under their surveillance. This traditional ethic is still clearly dominant but there is much to suggest that it is being

eroded at its core and may eventually even be abandoned. This of course will produce profound changes in Western medicine and in Western society. . . .

The process of eroding the old ethic and substituting the new has already begun. It may be seen most clearly in changing attitudes toward human abortion. In defiance of the long held Western ethic of intrinsic and equal value for every human life regardless of its stage, condition, or status, abortion is becoming accepted by society as moral, right and even necessary. It is worth noting that this shift in public attitude has affected the churches, the laws, and public policy rather than the reverse. Since the old ethic has not yet been fully displaced it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance[1] of the scientific fact, which everyone[2]

[1] "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. at 159. *Contra, Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S. 2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973) (cited in *Roe*, and also "legalizing" abortion but at least admitting the obvious that the human fetus is human and alive).

[2] "WHEN DID YOU START GROWING? You started growing from just two cells about nine months before you were born. One cell, a sperm cell, came from your father. Another cell, an egg cell, came from your mother. The two cells joined together inside your mother's body. They formed a special new cell called a fertilized egg. This cell was the start of a whole human being — you." I *Charlie Brown's 'Cyclopedia. Super Questions and Answers and Amazing Facts. Featuring Your Body* 3 (1980). Apparently, though adults lie among themselves about the beginning of life, books for children teach the scientific fact that life begins at conception regardless of the protested befuddlement of some adults about simple biology. After all, the children, later in professional schools or upon appointment to high office, can learn to be disingenuous.

> really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.
>
> *A New Ethic for Medicine and Society,* 113 Cal. Med. 67, 68 (1970).

Actually, the "new ethic" is not new, but old, and the avoidance of the fact that abortion is killing is not so "curious" or puzzling. We all know abortion is wrong and at a minimum we have discomforting stirrings of guilt. In fact, the absence of such minimal stirrings in a human heart would be pathological. Only a truly sick soul can view with equanimity the killing of a unique human life. Therefore, it is somewhat to our credit that we choose blindness. The defensiveness, insecurity, and sensitivity of the Court's majority in the *Abortion Cases* are signs of conscience. *Thornburgh v. American College of Obst. and Gyn.*, 106 S. Ct. at 2206 (White, J., dissenting). Perhaps there is life yet or the beginning of life.

In efforts to avoid the fact of the killing with which we are uncomfortable, whether for it or against it, oxymorons such as "potential life" are used. After a life begins, its *existence* is of course actual and not potential throughout the lifetime. An individual life has potential, but the life itself is actual.

Another "curious" avoidance of the killing fact and example of semantic gymnastics and schizophrenic subterfuges in the abortion controversy is the use of the word "person." "Person" as a word has now been returned to its original meaning of a mask for an actor on the stage. The courts of

the United States deny this mask to separate and distinct, flesh and blood human beings *in utero,* but give the mask to registered and licensed corporations. Without the mask, flesh and blood can be killed because this Court has held this human flesh and blood is not included in "the word 'person,' as used in the Fourteenth Amendment." *Roe v. Wade,* 410 U.S. at 158.

In *Commonwealth v. Welosky,* 276 Mass. 398, 177 N.E. 656 (1931), Chief Justice Rugg interpreted the word "person" in a portion of a statute concerning jury service. The requirement read "person qualified to vote for representative in the general court." 177 N.E. at 658. The statute had been passed in December, 1920. The Nineteenth Amendment to the United States Constitution giving women the right to vote had just been ratified previously in August, 1920. The issue before the court was whether the word "person" in the statute included women.

Chief Justice Rugg, 177 N.E. at 659, citing earlier authorities, stated, "The natural and obvious meaning of the word 'person' is a living human being." He then anticipated *Roe's* reasoning, "The Constitution does not define 'person' in so many words," *Roe v. Wade,* 410 U.S. at 157, and stated:

> The word "person" like many other words, has no fixed and rigid signification, but has different meanings dependent upon contemporary conditions, the connection in which it is used, and *the result intended to be accomplished.*
>
> 177 N.E. at 659 (emphasis added).

The Massachusetts Supreme Court then ruled that the word "person" did not include women.

In *Roe v. Wade* the *"result intended to be accomplished"* was abortion on demand and therefore a Humpty Dumpty jurisprudence as to the meaning of the word "person" was

again practiced. " 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean -- neither more or less.' " L. Carroll, *Alice's Adventure in Wonderland* and *Through the Looking Glass* 186 (1960).

When the word "person" is manipulated to deny the right to life to human flesh and blood, but the same word is used to grant rights and privileges to an inanimate corporation, the semantic gymnastics cease being "curious" and "ludicrous" and become grotesque. "Person" as a legalism can be expanded to include General Motors. But at the least, in realism, it must include all human beings; otherwise, the word "person" in the Fifth and Fourteenth Amendments is meaningless to humans as offering them any protection. In the *Abortion Cases,* "person" has become a metaphor without reference. It is like saying Paul Newman is a star, but Alpha Centauri is not. Or that the members of this Court embody justice, but God does not.

The schizophrenia about the killing continues with word games about meanings of "human being" and "fetus". There is no "fundamental and well recognized difference between a fetus and a human being," *Thornburgh,* 106 S. Ct. at 2188, (Stevens, J., concurring), because the terms are *not* mutually exclusive. A human fetus is a human being. A dog fetus is a dog being. A cow fetus is a cow being. "Fetus" only means "young," a "suckling".

When the human beings on this Court were human fetuses, they were not lesser beings. The poetic or the impertinent might even metaphorically argue that Court members were more human then.

But non-metaphorically and scientifically, a human being is a human being and human beings are persons. Living beings come into existence all at once and then unfold. Man is not a rational *animal* assembled in stages. He may be animal-like in certain aspects, but that does not make him

an animal anymore than being God-like (the ability to think abstractly) makes him God.[3] Man is a totally unique rational being. No entity can "become" a human being and a person unless it already is a human being and a person. No living being can become something other than what it is, ontologically. Living beings are created at once, they are not manufactured part by part. That an individual life begins as a single cell and grows does not mean its beingness, itself, is subject to construction. An amputee does not cease being a human being though he is not whole. It is doubtful if any of us are ever whole in this life. We are created and then we unfold. We may be nurtured, warped, or destroyed, but we

[3]*Contra, Thornburgh v. American Coll. of Obst. and Gyn.*, 106 S. Ct. at 2185 (Stevens, J., concurring). *Bowers v. Hardwick*, 106 S. Ct. 2841, 2848-56 (1986) (Blackmun, J., with Brennan, Marshall, and Stevens, JJ., dissenting), sets forth the totally individualistic view of man and states that all rights recognized by the Court——to marriage, family, procreation, etc.——are done so, not from any recognition of a Creator or any innate nature of man, but only to facilitate "an individual's self definition" and to allow the "ability independently to define one's identity." *Id.* at 2851. This destructive notion of liberty is libertinism and holds there is no moral law intrinsic to the human. In fact, the view absolutizes choice and asserts "there may be many 'right' ways." *Id.* Nihilism is their norm. This view is man's oldest temptation——to make himself God. As a religious view, it dates back to Adam. Of course, it has never had any validity, for libertinism is a false religion and man is a false god. In *Thornburgh*, 106 S. Ct. at 2190, Adam's time is even cited and we are treated to the lack in Eden of "a rule against eating apples" [sic] to support the libertine claim. *Thornburgh*, 106 S. Ct. at 2187 n.5 (Stevens, J., concurring), cited in *Bowers v. Hardwick*, 106 S. Ct. at 2851 (Blackmun, J., with Brennan, Marshall, and Stevens, JJ., dissenting), quotes Fried, *Correspondence*, 6 Phil. & Pub. Affairs 288-89 (1977), and states the anarchic proposition that "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.' " That position holds in libertine jurisprudence unless one is a soldier or an unborn child. "You seek security not for the peace of your country but for your own impunity in debauchery." St. Augustine, *City of God*, Book I, Chapter 33, at 45 (1986). A true jurisprudence recognizes Plato's refutation of the Sophists' nonsense that "man is the measure of all things" and holds that, "Totally unlimited play for free will, however, is not allowed in our or any society." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973).

are, while we live, human beings and persons. That does not change for ". . .there is no nonarbitrary line separating a fetus from a child or, indeed, an adult human being." *Thornburgh*, 106 S. Ct. at 2195 (White, J., dissenting). And when we are created, we are endowed with certain unalienable rights, and that endowment cannot be dependent on transient majorities in legislatures or courts practicing semantic gymnastics or schizophrenic subterfuges to rationalize the taking of human life.

> The Subcommittee rejects as misleading semantic efforts to manipulate the English language and to redefine "human being" according to particular value preferences. Instead we adhere to the customary meaning of "human being" as including every living member of the human species. S. 158 embodies the Subcommittee's finding, in accordance with the overwhelming consensus of scientific authority, that the life of a human being begins at conception. Our analysis of the leading works on embryology and fetal development indicates that witnesses who disputed that the life of a human being begins at conception reflect not scientific judgment, but rather the value preference of certain members of the scientific community against protecting the life of unborn human beings.
>
> Senate Comm. on the Judiciary, The Human Life Bill — S. 158, S. Rep. No. J-97-16, 97th Cong., 1st Sess. 7, 13 (1981).

There is reality. There is fact. And fact bespeaks value. The law cannot function lost in the cosmos dislocated from human reality — a reality of individual existence, individual suffering and individual redemption or individual damnation.

The issue before this Court is not a question of "the state's interest in the protection of an embryo," *Thornburgh*, 106 S. Ct. at 2188 (Stevens, J., concurring), which embryo when human is a human being, of course. Rather, the question

concerns the inalienable antecedent rights of that human being, the protection of which is the very reason the state was even brought into existence.

> If a man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. . .
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights.
>
> *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., with Brennan and Marshall, JJ., dissenting).

It is the reality of man endowed with life and liberty by his Creator to which we are called in the American experience; otherwise, all the natural law rhetoric of values that are "more important than the will of a transient majority" *Thornburgh*, 106 S. Ct. at 2190 (Stevens, J., concurring), or appeals to "values most deeply rooted in our Nation's history," *Bowers v. Hardwick*, 106 S. Ct. at 2856 (Blackmun, J., dissenting), are exposed as mere sham and anchorless ballast sounding good but signifying nothing. Such natural law claims are also invalid when they deny the fundamental created nature of man and his dignity. The law in favoring liberty over life is like the Scotsman who when confronted with the demand for his money or his life chose that his life be taken as he was saving his money for his old age. If the given integrity of the individual human life is not respected, all other rights fall.

> This was their majestic interpretation of the economy of the universe. This was their lofty, and wise, and noble understanding of the justice of the Creator to His creatures. Yes, gentlemen, to *all* His creatures, to the whole great family of man. In their enlightened belief, nothing stamped with the Divine image and likeness was sent into the world to be trodden on, and degraded,

> and imbruted by its fellows. They grasped not only the whole race of man then living, but they reached forward and seized upon the farthest posterity. They erected a beacon to guide their children and their children's children and the countless myriads who should inhabit the earth and other ages.
>
> Abraham Lincoln, II *Collected Works of Abraham Lincoln* 546 (R. Basler ed. 1953).

The present failure of our country, as at the time of *Dred Scott*, to adhere to the metaphysical principles of the Declaration of Independence in interpreting and understanding our Constitution is not the product of increased wisdom and sophistication, but rather of degeneracy. This modern standard of selfishness and narcissism represents a profound failure of the heart, a weakness of the intellect and sickness of the soul.

In life sometimes there is no honorable escape from suffering. Chosen moral anesthesia in such times leads by progressive degeneration ultimately to Hell, a place where no such masks can be worn and which inferentially has been recognized by concurring opinion in this Court, *Thornburgh*, 106 S. Ct. at 2189 (Stevens, J., concurring); *see also id.* at 2188 n.7. In studied understatement, it was observed that perhaps a consequence of abortion of "major importance" to the mother concerned "the salvation of her own mortal soul." What then of millstones about the neck and those who lead her to harm?

Roe v. Wade is the hallmark of an exploitive society in which male jealousy and domination and female inferiority have been enshrined as its basic organizational principles all under a jargon of "equality." Value, meaning, strength, and purpose in the feminine is denied. In this morbid and bigoted view of woman, pregnancy is projected as a deformity, a politically imposed inequality, rather than an awesome and natural event. The acceptance of millions of abortions and

the loss of life there entailed discloses objectively an utter contempt for woman that covers its sniveling condescension with a rhetoric of pity and progress. *Roe v. Wade* has legally buttressed a modern Victorian bias against female sexuality, human bonds, and life by removing any culturally sanctioned reinforcement or protection of natural maternal instinct and moral duty.

The protection of a life that did not ask to be created, but whose existence is given, is held to be too much to ask of a woman. She is not equal to responsibility. But she is free to play the whore and when no longer nubile, to be discarded into a political movement of Harpies so that hunter men, deafened to hurt and guilt, their own and others, might glean the new and younger crop of liberated "minds". And since the child she carries is not seen as a person or valued in this culture, neither is the woman so recognized or so valued. *Roe v. Wade.* In secular history, she has moved from private property to public chattel. She may wait in line for the abortion table so she can return to the assembly line or the office pool. Abortion is viewed as a necessity in such a predatory and promiscuous society.

But reality asserts itself tragically. The mother on the abortion table, by manipulation or choice, is wounded because she and her child are persons, and *all* babies have birthdays.

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 458 (1983), Justice O'Connor with Justices White and Rehnquist in dissent spoke of *Roe v. Wade* as being on a collision course with itself due to the development of fetology and medical practice. From the beginning *Roe v. Wade* collided with itself, for it flew in the face of reality and the collected common experience in life, law and medicine. In 1964, Dean Prosser was writing concerning legal duties to the unborn child (he did not fear to use the term "unborn child" since he did not suffer from our guilt):

> So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by law. . .
>
> Viability of course does not affect the question of the legal existence of the fetus, and therefore the defendant's duties; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.
>
> Prosser, *Law of Torts* 355, 356 (1964).

Yet now this "unborn child in the path of an automobile" who is "as much a person in the street as the mother," *id.* at 355, may be killed at the mother's discretion and at the mother's convenience. So much for the balancing of rights.

In 1798 Justice Butler wrote,

> Let us see what the nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction, and he may have a guardian.
>
> *Thellusson v. Woodford*, 4 Ves. 227, 322, 31 Eng. Rep. 117 (1798).

And in 1986, when we know more about him than at any other time, can physically treat him and care for him more than at any other time, he does not have even the basic right to life.

Previously, in *Raleigh Fitkin - Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964), the law protected the unborn child by mandating needed blood transfusions, overriding the religious rights of the parents who were Jehovah's Witnesses. Presumably this would still be the law for Jehovah's Witnesses. But if the parents are moderns, worshiping the golden calf, their religion, which includes child sacrifice, is favored as it has been established by this Court's majority in the *Abortion Cases*. Where can the law stand now to uphold any standard of behavior?

Recently two cases have appeared in California that should be of some interest to this Court. In one of them a mother is being prosecuted for child abuse because she took drugs while she was pregnant in dereliction of any care for the life she was carrying. It is obvious she could have gone and had the child killed by a licensed abortionist for the reason that she wanted to take drugs. Where can the law stand now to uphold any standard of behavior?

In another instance, an unborn child suffering from a urinary tract problem was partially removed from the uterus, operated on, returned to the uterus, and subsequently delivered at full term. Now were a case to be brought to this Court in which such events were part of the factual record, how would the reality be dealt with? Is the portion of the child that has been removed from the womb prematurely for medical treatment a person but the portion that is left in not? Is the entity half a human being and half not? Is he half a person under the Fourteenth Amendment? And is it a matter of indifference to public order and human society if subsequent to this saving operation, the mother were to kill the child prior to his birth at full term? Or after his birth at full term?

> . . .If the United States government is to give reasonable consideration to the abortion issue it must start from the fact that unborn children are human beings.

> The hearings before this subcommittee show that this fact is not seriously in doubt; it is questioned only by means of efforts to redefine "human being" in a purely subjective manner. *No governmental body that approaches the abortion question with honesty can accept semantic gymnastics that obscure the real issue.*
>
> S. Rep. No. J - 97 - 16, *supra*, at 13 (emphasis added).

At a minimum it is time the Supreme Court as a governmental body approach the abortion question with honesty and end its semantic gymnastics and schizophrenic subterfuge, no matter that such practices might speak well for those who use them. Honesty, though painful, is open to redemption, or, at least, gives hope of reform.

The Court is well briefed with materials demonstrating the humanity of the unborn. Textbooks, treatises, and pictures have been cited and shown by advocates for our unborn brothers and sisters. ". . .[T]hey outline at length and in detail the well-known facts of fetal development." *Roe v. Wade*, 410 U.S. at 55. But the problem is not one of scholarship, intellect, or properly phrased argument, for ours is an age of folly. *Roe v. Wade*, 410 U.S. 113; *Bowers v. Hardwick*, 106 S. Ct. at 2848-59 (Blackmun, J., with Brennan, Marshall, and Stevens, JJ., dissenting).

Abortion is an evil, but its legalization is a folly. A consequence of such a mixture of sin and insanity in a society is a paralysis of intellect, heart, and will, undermining self government. Rational discourse cannot survive semantic gymnastics or schizophrenic subterfuge. Without rational discussion there can be no order, only anarchy. This nation may survive the present age only if the abortion evil exposes itself and our foolishness quickly enough. Otherwise, lulled in our lunacy we may only die — a subject for some future chroniclers. No doubt such historians would dutifully record our uncomfortableness with abortion, but also that we perservered in our folly and evil.

Folly is a more dangerous enemy to the good than evil. One can protest against evil; it can be unmasked and, if need be, prevented by force. Evil always carries the seeds of its own destruction, as it makes people, at the least, uncomfortable. Against folly we have no defense. Neither protests nor force can touch it; reasoning is no use; facts that contradict personal prejudices can simply be disbelieved — indeed, the fool can counter by criticizing them, and if they are undeniable, they can just be pushed aside as trivial exceptions. So the fool, as distinct from the scoundrel, is completely self-satisfied; in fact, he can easily become dangerous, as it does not take much to make him aggressive. A fool must therefore be treated more cautiously then a scoundrel; we shall never again try to convince a fool by reason, for it is both useless and dangerous. . .The fact that the fool is often stubborn must not mislead us into thinking that he is independent. One feels in fact, when talking to him, that one is dealing, not with the man himself, but with slogans, catchwords, and the like, which have taken hold of him. He is under a spell, he is blinded, his very nature is being misused and exploited. Having thus become a passive instrument, the fool will be capable of any evil and at the same time incapable of seeing that it is evil. Here lies the danger of a diabolical exploitation that can do irreparable damage to human beings.

Dietrich Bonhoeffer, *Letters and Papers from Prison* 7, 8 (E. Bethge ed. 1967) (written in a National Socialist prison awaiting execution).

The founding fathers of the American Republic were students of the Roman Empire. Our government, our architecture, even the names of our offices, all copy Rome. They hoped that it would be our experience that we would avoid their frailties, follies, and failure while benefiting from their experience and the recognition of the intrinsic worth of each individual.

Wise statesmen as they were, they knew the tendency of prosperity to breed tyrants, and so they established these great self evident truths, that when in the distant future some man, some faction, some interests, should set up the doctrine that none but rich men, or none but white men, were entitled to life, liberty and the pursuit of happiness, their posterity might look up again to the Declaration of Independence and take courage to renew the battle which their fathers began — so that truth and justice and mercy and all the humane and Christian virtues might not be extinguished from the land; so that no man would hereafter dare to limit and circumscribe the great principles on which the temple of liberty was being built.

Abraham Lincoln, II *Collected Works of Abraham Lincoln* 546, 547 (R. Basler ed. 1953).

Factions and interests of selfishness have now set up the doctrine that only born man is entitled to life, and so it is again to the great self evident truths of the Declaration of Independence we must return.

But as things are, the intelligent are infected by a gross mental disorder which makes them defend the irrational workings of their minds as if they were logic and truth itself, even when the evidence has been put before them as plainly as is humanly possible. Either they are too blind to see what is put before their face or they are too perversely obstinate to admit what they see. The result is that we are forced very often to give an extended exposition of the obvious, as if we were not presenting it for people to look at, but for them to touch and handle with their eyes shut.

St. Augustine, *City of God,* Book II, Chapter 1, 48 (1986).

CONCLUSION

An experienced trial judge once summed up jury instructions by saying that all they meant was "Do right." It is time for this Court in an abortion ruling to do right.

At a minimum, the Court should cease its semantic gymnastics and schizophrenic subterfuges even if it is unable to restrain its violence to the U.S. Constitution in service of slogans, catchwords, and fashion. The Illinois Act should either be upheld, that we might begin to withdraw from the abortion evil, or *Roe v. Wade* overruled.

Respectfully submitted,

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DECEMBER 18, 1986

AMICUS CURIAE

BRIEF

No. 85-673

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

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October Term, 1986

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RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

vs.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN VICTIMS OF ABORTION, TERESA WIBBELSMAN, HOLLY TRIMBLE, AND LORA HOOBLER IN SUPPORT OF APPELLANT, NEIL F. HARTIGAN

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Appellees.

On Appeal From The United States
Court of Appeals For The Seventh Circuit

NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST OF THE AMICI

The *amici* Teresa Wibbelsman, Holly Trimble, and Lora Hoobler are women who procurred abortions as minors without their parents' knowledge. To a large extent their abortion decisions were uninformed. In retrospect, they believe that 24 hours notice of their abortions to their parents would have significantly altered their experiences dealing with their problem pregnancies. The amici are aware of the Illinois 24-hour parental notice requirement at issue in this case, and they offer their experiences to the Court to illustrate the need many young girls have for that protection in making abortion decisions.

Teresa Wibbelsman was sixteen years old when she learned she was pregnant. She had been raised in a Catholic home and attended parochial schools. All she knew about abortion was that it would "take care of" the problem. No one at the family planning center, where her pregnancy was diagnosed, offered her any counseling except a referral to an abortion clinic. She made her decision to abort primarily because she was afraid to tell her parents of her pregnancy; she didn't want them to know she had disappointed them. Her boyfriend took her from her Ohio home to a Louisville, Kentucky, abortion clinic. At the clinic she signed consent forms which were placed in front of her without explanation. She does not remember reading the forms. The only counseling she received at the clinic was a brief description of the abortion procedure using a plastic anatomy model, given to a group of seventeen girls at once.

Teresa's abortion proceeded smoothly and she suffered no known physical complications. The abortion exacted an emotional toll, however. Teresa blocked the abortion from her mind but her self-worth had plummeted. She slipped into promiscuity and drug and alcohol abuse. She began to play what she calls "car games" — closing her eyes while driving over bridges, or accelerating on the freeway and closing her eyes until fear forced her to open them again.

Five years after Teresa's abortion, her fifteen-year old sister was impregnated on a "date rape." Teresa's sister, rather than obtaining a secret abortion, went to her parents with her problem. Together, they decided that the child would be carried to term and placed for adoption. Seeing her sister's trust in her parents and their warm support for her in her crisis produced feelings of jealousy in Teresa, causing her to wish she had handled her pregnancy the same way.

Nearly six years after her abortion, Teresa consciously acknowledged that she felt tremendous guilt over the abortion. Although she was still unmarried, she determined a time when she would be fertile and deliberately became pregnant on a "one-night stand." She made adoption arrangements in Louisville. Her little girl was born on the anniversary of her abortion. Teresa took her to Louisville for adoption to "replace" the child Teresa had aborted there.

Teresa is convinced that if she had known at the time of her abortion decision what she now knows about her parents' supportive reaction to a problem pregnancy, she would not have chosen to abort. Thus a 24-hour parental notice requirement would, in Teresa's case, have saved her from the anguish which followed a decision that turned out to have been wrong for her.

Holly Trimble was also sixteen years old when she became pregnant. She was personally opposed to abortion, but she was afraid her parents would be hurt if they knew of her pregnancy. Her boyfriend's older brother and his girlfriend persuaded her that obtaining a secret abortion was the best thing for her to do. Holly recalls that she was not in good condition to make a decision; the pregnancy made her feel ill, and she was vomiting every day. Although she was ten weeks pregnant, she believed at the time that her fetus was just a "little egg." Prior to her abortion, she asked a matronly counselor at a state family planning office

if women felt badly after abortions. "No, they're usually relieved because they can go on with their lives," she was told. "Sometimes a woman is bothered if she feels the fetus move before her abortion and she thinks it's alive; but she shouldn't because it's really not."

Within a week of her abortion, Holly *did* begin to feel badly about it. Because the purpose of her abortion was to hide her pregnancy from her parents, she couldn't talk to them about her turmoil. When *Life* magazine ran pictures of ten-week-old fetuses, Holly saw them and became horrified at what she had done. She felt intense guilt whenever she saw a baby. Eventually she sought help from a priest and her conscience was temporarily assuaged.

Nine years later, Holly had married and become pregnant. She had learned more about fetal development and was acutely aware of the new life she was carrying within her body. That awareness stirred up memories and remorse over her earlier abortion. Her depression became so severe that she sought professional help. Her psychiatrist finally hospitalized her in the psychiatric ward of a local hospital three months after the birth of her son. Eventually she was referred to another psychiatrist who placed her on anti-depressant medication for several months. Only after careful counseling did she improve to the point where she was able to go through another pregnancy and post-partum period with very little depression.

Holly still looks back at her abortion decision with great regret. She believes that if she hadn't felt it necessary to shield her parents from knowledge of her pregnancy, she would not have obtained her abortion. She also is certain that, if she had been exposed to information about fetal development at the time of her decision, she would have chosen to carry her child to term.

Lora Hoobler was seventeen when she became pregnant. She and her boyfriend assumed without discussion that she

would get an abortion. She knew that her parents felt abortion was wrong, but she did not want them to know she was pregnant. She visited a women's clinic and saw a counselor who scheduled her abortion. The counselor gave her no information on fetal development or abortion complications but did ask her, "Are you going to freak out on us?" Lora did not know what she was referring to and answered, "No." Lora didn't consult with anyone else about her abortion. She recalls that she didn't want to think about what she was doing because deep inside she believed her decision was wrong.

The abortion was performed. Lora regained consciousness in the operating room and saw a tube filled with the blood and tissue that had been extracted from her body. The reality of what she had done hit her "like a brick". She remembered her parents saying, "Abortion is murder." Lora wept uncontrollably for 45 minutes until the clinic staff sent her boyfriend in to remove her.

Lora suffered from severe depression for two years following the abortion. When she found some literature showing details of fetal development, she was amazed and appalled. She felt betrayed. Even though she had not understood what she was doing until after the abortion was over, she carried a heavy burden of guilt. She broke up with her boyfriend and became what she describes as "hopelessly" promiscuous. She tried drugs and alcohol. Her depression did not lift until she had a "born again" religious experience.

Lora cannot say for certain that a parental notification requirement would have changed the outcome of her pregnancy. She does know that she made an uninformed abortion decision, the price of which was very high for her and which she now regrets as the worst decision of her life. She believes consultation with her parents could have resulted in a different decision.

Teresa, Holly, and Lora are associated with the amicus American Victims of Abortion. AVA is a national organization of persons whose lives have been adversely affected by abortions, their own or a family member's. The objective of AVA is to provide a forum for these individuals to educate legislatures and the public about the tragic consequences of abortion for some women. Based on the experiences of AVA members who obtained abortions as minors, AVA supports legislation, such as Illinois' parental notification requirement, which may protect young women from making uninformed abortion decisions.

BRIEF AMICUS CURIAE

NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated in the Appellant's Brief of Neil F. Hartigan.

SUMMARY OF ARGUMENT

A problem pregnancy requires a woman to make one of the most complex and difficult decisions of her life. Her consideration of multiple social, economic, and moral factors may be hampered by the physiological and psychological changes produced in her by the pregnancy itself. Many women do not know, at the time of their decision, that abortion can produce a severe post-traumatic stress disorder.

Minor women, in particular, are often ill-informed about pregnancy and abortion and unable to make mature, rational decisions in their own best interest. This Court has recognized that immature minor women are in need of special protection in making critical decisions, even where that protection results in a limitation on their exercise of constitutional rights. The Court has also recognized that

the furthering of parental consultation in minor women's abortion decisions is a constitutionally permissible end.

Illinois' 24-hour notification requirement ensures sufficient time for parental consultation before minor women obtain abortions. This requirement is a reasonable means to ensure that minors have time to consult with their parents and are thereby assisted in making informed, wise abortion decisions. The purpose of Illinois' 24-hour notification and consultation period distinguishes it from the 24-hour waiting period struck down in *Akron*, which only encouraged additional contemplation by women who had already consulted with their physicians and made informed decisions to abort.

ARGUMENT*

I. INTRODUCTION

The amici Teresa Wibbelsman, Holly Trimble, and Lora Hoobler share a regret that they decided to obtain abortions as minors without the benefit of their parents' advice and emotional support. Each of them experienced unexpected trauma and remorse following their abortions. Their stories and the similar stories of other members of American Victims of Abortion are typical of a large number of teenagers who make hasty, secret, and ill-informed abortion decisions.

The special attention given to the abortion decision by this Court is well justified. Sociologists are still learning of the complexities of the abortion decision. It has been found that the decision-making processes of women with problem pregnancies involve several stages and numerous influencing factors, such as source of information,

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* The author wishes to acknowledge the assistance of Vincent M. Rue, Ph.D., Marriage and Family Therapist and Psychotherapist, Executive Director, Sir Thomas More Marriage and Family Clinics of Southern California.

relationship to the father, beliefs about the beginning of human life, attitudes toward abortion, and perception of the decision as individual or joint. Williams & Ventimiglia, *Abortion or Birth? Discriminators in Problem Pregnancy Decisions*, 1 SOCIOLOGICAL SPECTRUM 115 (1981). Moreover, the complexity of the decision-making process is compounded by the effects of the pregnancy itself. It has been noted that pregnancy, even when wanted, can be a period of crisis involving profound psychological and physiological changes. Bibring, *Some Considerations of the Psychological Processes in Pregnancy*, 14 PSYCHOANALYTIC STUDY OF THE CHILD 113, 116 (1959). Some women's pregnancies may be characterized by borderline personality states, i.e., "magical thinking, premonitions, depressive reactions, primitive anxieties, and introjective and paranoid mechanisms." *Id.* at 115. More commonly, an unexpected pregnancy evokes feelings of stress, anxiety, dissatisfaction, and shame. Clearly, many women are facing difficult decisions with permanent consequences at a time when they are less-than-optimally prepared to make those decisions.

Psychological research is confirming not only the complexity of the abortion decision but also the deleterious effects of abortion on some women, ranging from mild depression to serious suicidal impulses. *See* Appendix A, Table of Major Studies on Psychological Ill Effects of Induced Abortion. As more data on the after-effects of abortion has become available, a pattern of a post-traumatic stress disorder has emerged. *See* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS §308.30 (1980). A psychologically traumatic event that is generally outside the norm of usual human experience, such as the intentional death of one's fetal child by abortion, can produce characteristic symptoms of a post-traumatic stress disorder.

The symptoms of the "post abortion syndrome" stress disorder include mentally re-experiencing the abortion event, numbing of responsiveness to the external world leading to reduced involvement, sleep disturbance, impaired memory or difficulty in concentrating, guilt feelings about surviving when the fetal child did not, and increased irritability and impulsive behavior. Impairment from the disorder may either be mild or affect nearly every aspect of life. "Psychic numbing" may interfere with interpersonal relationships, such as marriage or family life. Depression and guilt may result in self-defeating behavior or suicidal actions. Drug or alcohol abuse may develop, and "anniversary reactions" are common. The symptoms often intensify when the woman is exposed to situations that resemble or symbolize the original abortion trauma, such as a visit to a clinic or a nursery. *See generally* Rue, *Post Abortion Syndrome*, in POST ABORTION COUNSELING (A. Speckhard ed.) (in press). The experiences of the amici Teresa, Holly, and Lora comport with the reported symptoms associated with post abortion syndrome.

Approximately 28% of all abortions in the United States are performed on women under the age of nineteen. CENTERS FOR DISEASE CONTROL, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ABORTION SURVEILLANCE 4 (1985). Unfortunately, teenagers seem to be particularly at risk for adverse reactions to abortion. In addition to the pressures facing older women with problem pregnancies, teenagers may be contending with peer pressure, self-identity struggles, new social freedoms and responsibilities, and value clarification. One study found that relatively more teenagers than older women suffered anxiety, depression, sadness, guilt, and regret following abortions. Cates, *Adolescent Abortions in the United States*, 1 J. ADOLESCENT HEALTH CARE 18 (1980).

Beyond the psychological risks, teenagers who undergo abortion are at risk physically as well. Researchers who

analyzed data collected under the auspices of the Centers for Disease Control on teen abortion morbidity and mortality concluded that women under age eighteen who obtained suction-curettage abortions were more susceptible to cervical injury than were older women. They concluded, "These findings cause concern because cervical injury in initial unplanned pregnancies may predispose young women to adverse outcomes in future planned pregnancies." Cates, Schulz, & Grimes, *Risks Associated with Teenage Abortion*, 309 NEW ENG. J. MED. 621 (1983). Hence, one abortion decision can impact the entire childbearing potential of the teenage patient.

Due to the enhanced psychological and physiological risks facing these young women, the extension of special protection to them as they face unexpected pregnancy decisions is warranted. The State of Illinois has chosen to extend that special protection to pregnant minors in its Parental Notice of Abortion Act of 1983.

II. MINORS' NEED FOR PROTECTION SUPPORTS STATE LIMITATIONS ON THE CONSTITUTIONAL RIGHT OF MINORS TO MAKE ABORTION DECISIONS

It is, of course, well established that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (plurality opinion). Nevertheless, the Court "long has recognized that the State has somewhat broader authority to regulate the activities of children than adults," even in areas involving constitutional rights. *Id.* This broader authority rests upon the principle that "'a State may permissibly determine that, at least in some precisely delineated areas, a child ... is not possessed of that full capacity for individual choice' which is essential to the

exercise of various constitutionally protected interests." *Carey v. Population Services International*, 431 U.S. 678, 705 (1977) (Powell, J., concurring in the judgment) (quoting *Ginsburg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in the result)).

Justice Powell further explained the States' greater regulatory authority over minors in *Bellotti v. Baird II*, 443 U.S. 622, 634-37 (1979):

> We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing.
>
> * * *
>
> Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, ... sympathy, and ... paternal attention."
>
> * * *
>
> Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.
>
> * * *
>
> Third, the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors.

These principles have been applied by the Court to justify state requirements of parental consent to minors' abortions (with available alternative court procedures to obtain abortions), *id.*; *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476 (1983), and parental notification of immature, dependent minors' abortions, *H.L. v. Matheson*, 450 U.S. 398 (1981).

The Court's recognition that minors' abortion decision-making abilities may be handicapped by their immaturity is borne out by sociological and psychological research. To begin with, teenagers, as a population, are poorly informed about abortion. A recent study showed that more than one out of three teenage girls knew little about pregnancy and abortion and that they wanted more information. Further, the researchers concluded that one should not assume that a teenager will ask pertinent questions when she wants to know more about sexual subjects. Ostrov, Offer, Howard, Kaufman, & Meyer, *Adolescent Sexual Behavior*, 19 MED. ASPECTS HUM. SEXUALITY 28 (1985).

More significantly, existing clinical opinion and developmental research indicate that the cognitive processes of many adolescents are not sufficiently developed to allow for rational decision-making in serious matters. According to cognitive theory, immature children think haphazardly, only in concrete and specific terms, and only for the immediate moment. As they mature, they become capable of formal operational thought, i.e., able to anticipate possible outcomes, weigh the value of each outcome, test systematically, consider complex interactions, and associate behavior with outcomes. Formal thought processes may appear during the early years of adolescence, Niemark, *Intellectual Development during Adolescence*, 4 REVIEW OF CHILD DEVELOPMENT RESEARCH 541 (F. Horowitz ed. 1975), but cognitive maturation varies widely among individuals.

Researchers at the University of Texas at Austin analyzed data on factors thought to be associated with

decisions to abort or continue pregnancies, and ultimately concluded, "[T]he ability to reason abstractly and to foresee consequences of future decisions would seem to be important in making a good decision of such magnitude [i.e., pregnancy revolution]. However, many teenagers may not yet be able to think abstractly, particularly when the decision concerns one's own sexuality. The role of formal operational cognitive skills in making life decisions with respect to sexuality and pregnancy decision making is largely unknown." Eisen, Zellman, Leibowitz, Chow, & Evans, *Factors Discriminating Pregnancy Resolution Decisions of Unmarried Adolescents*, 108 GEN. PSYCH. MON. 69, 94 (1983). Taking a cognitive-developmental approach assessing adolescent denial and risk-taking, one researcher concluded that the adolescent is in transition between concrete and formal (abstract) operative thinking. Cobliner, *Pregnancy in the Single Adolescent Girl: The Role of Cognitive Functions*, 3 J. YOUTH & ADOL. 17, 25 (1974). Other researchers have reported that in working with adolescents who are physically ill they found little evidence of formal operational functioning, going so far as to call it a "myth." Fletcher & Johnson, *The Myth of Formal Operations: Rethinking Adolescent Cognition in Clinical Contexts*, 11 CHILDREN'S HEALTH CARE 17 (1982).

In addition, an adolescent's emotions impact heavily on her ability to make sound and reasoned judgments. It has been noted, "teenagers may tend to be egocentric and to make irrational and emotional decisions about themselves and others.... [A] particular fourteen-year-old may have been more capable of making a certain decision when [s]he was younger, before the emotional upheavals of adolescence interfered with [her] judgment." Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. LAW QRTLY. 287, 315 (1983). Another researcher who analyzed adolescent abortion decision-making concluded, "Adolescents lack the adult benefits of life experience in autonomy and problem solving.... Young women may rely

on less analytical approaches to the problem, such as following the normative behavior of their peers or basing decisions on romantic, unrealistic scripts.... A well-thought-out pregnancy decision can enhance an adolescent's development." Brown, *Adolescents and Abortion: A Theoretical Framework for Decision Making*, 12 J. OB. GYN. & NEONATAL NURSING 241, 244-45 (1983).

Because many minors are so demonstrably ill-equipped mentally and emotionally to make critical decisions, and because the consequences of the abortion decision in particular can be unexpectedly severe, Illinois has determined that parents should be notified of pending abortions in order to give their minor daughters an opportunity to consult with them in making abortion decisions. Illinois' determination rests firmly on principles enunciated by this Court with regard to State authority to regulate minors' exercise of constitutional rights.

III. ILLINOIS MAY CONSTITUTIONALLY SEEK TO FURTHER PARENTAL CONSULTATION IN MINORS' ABORTION DECISIONS

Although the incapacities of minors justify some limitation on the free exercise of their constitutional rights in certain areas, the rule remains that "state restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant interest ... that is not present in the case of an adult.'" *Carey v. Population Services International*, 431 U.S. 678, 694 (1977) (plurality opinion) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976)). Thus, a Missouri blanket parental consent provision was invalidated by the Court in *Danforth*, 428 U.S. 52, which was not found to clearly further a significant state interest justifying the restriction. In his concurring opinion, however, Justice Stewart did identify one significant state interest which could justify a limited impingement on a minor's right to

choose abortion: the furthering of parental consultation during the making of a minor's abortion decision. Justice Stewart wrote:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.

Id. at 91 (footnote omitted).

Subsequent decisions of the Court confirmed that a state's interest in furthering parental consultation is indeed a constitutionally permissible end. Holding that a state may require a minor to obtain parental consent to an abortion so long as an alternative authorization procedure is provided, Justice Powell wrote in *Bellotti II*, 443 U.S. at 640:

> As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision — one that for some people raises profound moral and religious concerns.

(Footnotes omitted.) That language was relied upon again in *H.L. v. Matheson*, 450 U.S. 398, 409 (1981), to uphold a Utah parental notification requirement for immature, dependent minors seeking abortions.

Like Utah, Illinois has reasonably determined that an opportunity for parental consultation may correct the deficiencies inherent in the decision-making processes of immature pregnant minors. Although the opportunity for parental consultation does not guarantee that a pregnant minor's abortion decision will be better informed, it certainly enhances the likelihood that it will be, for reasons delineated by Judge Coffey in his dissenting opinion below. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1548-57 (1985) (Coffey, J., dissenting).

In addition to broadening the information base relied upon by the pregnant minor, parental consultation may benefit the family unit as a whole. Caring parents may be hurt more deeply by learning after a secret abortion that they were excluded when their daughter was in trouble, than by being confronted with the pregnancy initially. Rosen, Benson, & Stack, *Help or Hindrance: Parental Impact on Pregnant Teenagers' Resolution Decisions*, 31 FAMILY RELATIONS 271, 279 (1982). The sharing of a crisis can often produce family closeness and unity even where little previously existed. MCCUBBIN & FIGLEY, STRESS AND THE FAMILY: COPING WITH NORMATIVE TRANSITION (1983). Parental support during and after an abortion decision can be crucial to a young woman's ability to cope with the consequences of her decision. Finally, the stories of the amici Teresa, Holly, and Lora indicate that some teenagers obtain abortions primarily so that their parents will not learn of their pregnancy. Once the pregnancy is out in the open, the secrecy motivation will largely recede and other factors may be properly weighed in making the decision.

IV. THE ILLINOIS STATUTE IS TAILORED TO SERVE THE SIGNIFICANT STATE INTEREST IN FURTHERING PARENTAL CONSULTATION AND ENSURING MINORS' INFORMED CONSENT WITHOUT IMPERMISSIBLY BURDENING MINORS' CONSTITUTIONAL RIGHTS

In determining how it could protect minors from making uninformed abortion decisions, the Illinois legislature apparently was guided by the decision in *H.L. v. Matheson*, 450 U.S. 398 (1981), in which a parental notification requirement was upheld. Chief Justice Burger stated in his opinion:

> The Utah statute is reasonably calculated to protect [immature, dependent] minors ... by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences.

Id. at 412 (footnote omitted). By requiring parental notice in advance of the performance of an abortion upon a minor (with an appropriate alternative authorization procedure), the Illinois statute uses a mechanism already recognized as "enhancing the potential for parental consultation." Further, by requiring that the notice be provided 24 hours before the abortion, Illinois has satisfied an objection of the dissenting Justices in *Matheson* to the Utah notification statute — namely, that "the statute imposes no requirement that the notice be sufficiently timely to permit any discussion between the pregnant minor and the parents." 450 U.S. at 446.

The opponents of the Illinois statute argue that a 24-hour notice requirement contravenes the Court's holding in *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), that a 24-hour waiting period imposed on a woman, after she has given her written informed consent to abortion to her physician, violated her constitutional right of privacy. However, the 24-hour waiting period was

stricken in *Akron* because it did not further any legitimate state interest in ensuring that a woman's consent to abortion is informed. Under the City of Akron's requirement, the 24-hour wait was imposed *after* the woman had consulted her doctor, had received all the information she desired, and had made an informed decision. Thus, the purpose of the requirement was simply to provide additional time for contemplation.

By contrast, the purpose of Illinois' 24-hour notice requirement is to provide time for the parental consultation a minor may need to make an informed abortion decision. The encouragement of that consultation, as noted above, has already been recognized as a legitimate state interest which may be served by a parental notification requirement. Illinois' 24-hour consultation period is a moderate and reasonable means to effectuate the legitimate purpose of the law. Because the 24-hour consultation period furthers a legitimate state interest "that is not present in the case of an adult," *Carey v. Population Services*, 431 U.S. at 694, it does not share the infirmity of the City of Akron's requirement.

If Illinois is not allowed to ensure that a reasonable time for parental consultation is available, then its recognized interest in furthering consultation will be nullified in its practical application. The State's interest will have been upheld in theory but not in practice. As Judge Coffey noted in his dissent below, a bare requirement of parental notification without a consultation period allows a doctor to notify parents and then "proceed immediately with the abortion, never allowing the parents an opportunity to participate in the decision." *Zbaraz v. Hartigan*, 763 F.2d at 1555. Thus the underlying purpose of the Illinois statute, furthering parental consultation in abortion decisions, is inextricably linked to the need to allow reasonable time for its implementation.

Further, any inconvenience caused by the 24-hour consultation requirement is small when compared to the

gravity of the abortion decision and the permanent consequences it entails. Inasmuch as the Court has already sanctioned some protective limitation on minors' exercise of constitutional rights, the 24-hour consultation period does not amount to an impermissible burden.

CONCLUSION

Unlike the 24-hour waiting period struck down in *Akron*, which only served to delay a woman's abortion after she had made an informed decision, Illinois' 24-hour parental notification requirement serves the legitimate state interest of furthering parental consultation to help ensure that minors' abortion decisions are wise and informed. Any limitations the State's requirement imposes upon minors' exercise of a constitutional freedom are justified by immature minors' need for protection and guidance in making complex and irrevocable abortion decisions. The amici therefore argue that the Illinois 24-hour parental notification requirement is constitutional and should be upheld.

Respectfully submitted,

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APPENDIX

APPENDIX

Table 1: Major Studies on Psychological Ill Effects of Induced Abortion

Study	Date	Major Findings
Bracken and Suigar	1972	Self-reported negative abortion reactions were associated with being single, young, and lacking support from partner and parents.
Osofsky and Osofsky	1972	Sixteen percent of abortion patients were judged unhappy and twenty-five percent expressed guilt.
Perez-Reyes and Falk	1973	Fifteen percent of post-abortion adolescents expressed adverse feelings of depression, guilt, anger and anxiety.
Kaltreider	1973	Reported on the increased emotional difficulties in midtrimester abortion patients, noting that those women who perceived the fetus as a human being, i.e., baby, felt guilty or sad.
Ewing and Rouse	1973	Nineteen percent of post-abortion patients expressed immediate negative reactions, especially if there was prior history of emotional disturbance.
Moore-Caver	1974	Review of abortion literature found severe guilt in 2 to 23 percent of patients.

Table 1. contd.

Study	Date	Major Findings
Bracken, Hachovitch and Grossman	1974	Lack of parental emotional support to aborting daughters or pressure by parents for abortion were associated with negative reactions.
Lask	1975	Of 50 abortion patients, 32 percent had adverse outcomes, reporting moderate to severe feelings of guilt, regret, loss and self-reproach.
Evans, Selstad and Welcher	1976	Twenty percent regretted the abortion experience. Conservatism, religious affiliation, pressure to abort were highly related.
Greenglass	1976	Twelve percent of aborted women experienced negative psychological reactions with three percent attempting suicide. Psychiatric patients preabortion were three times as likely to require therapy postabortion.
Kent	1977	Abortions in patients' histories were major precipitants in seeking psychotherapy.
Gerrard	1977	Sex guilt was found to be significantly higher for women who have undergone abortions than for nonpregnant women.
Bracken	1978	Fifteen percent of the sample experienced a difficult abortion decision, anxiety, depression, and pain.

Table 1. contd.

Study	Date	Major Findings
Spaulding and Cavenar	1978	Reported post-abortion guilt and psychoses, and consternation and anniversary reactions.
Cavenar, Maltbie and Sullivan	1978	Described psychiatric sequelae of abortion in potential grandparents and other family members, and psychogenic problems post-abortion for some women for twenty years after the procedure.
Cavenar	1978	Report of psychogenic abdominal pain after abortion and anniversary reactions.
Brewer	1978	Twenty percent of sample reported negative psychic trauma.
Kumar and Robson	1978	119 primiparae were interviewed during the 12th and 36th week of pregnancy. In a significant proportion of these expectant mothers there was an association between depression and anxiety early in pregnancy and a previous history of induced abortion, suggesting a reactivation of mourning which was previously suppressed.

Table 1. contd.

Study	Date	Major Findings
Mester	1978	Induced abortion is a stressing experience and may for some women be traumatic. For the psychotherapist who might be overly influenced by pro-choice statistics and the feminist socio-political climate, he or she may unconsciously ignore or minimize the importance of the abortion experience for certain kinds of patients in pain.
Liebman and Zimmer	1979	Reported twenty four immediate and long term post-abortion abreactions affecting self image, relationships, and future coping abilities.
Adler	1979	Abortion is a stress experience. A sense of loss influences stressful, negative emotions. Responses to the experience will be a function of the nature and meaning of the pregnancy to the individual, her defensive and coping style, and her social environment.
George	1980	Women who sought abortions scored higher than controls on neuroticism and manifest anxiety.
Freeman	1980	After abortion, repeat aborters continued to have significantly higher emotional distress scores in interpersonal relationships.

Table 1. contd.

Study	Date	Major Findings
Ashton	1980	Of 64 women studied, short term disturbances affected over half, including guilt, regrets and sensitivity to comments from others regarding the abortion.
Cates	1980	Relatively more teenagers than older women suffered anxiety, depression, sadness, guilt and regret.
Gould	1980	Examined health experiences of Harvard women post abortion. Post abortion depression, anniversary reactions, guilt and despair were identified. Found long-term implications of abortion were unclear but that resolution of conflicts may be more smoothly achieved with therapeutic intervention than without.
David, Rasmussen and Holst	1981	Affirms negative post abortion reaction worst for women not in a relationship. Counseling is critical.
Williams and Ventimiglia	1981	To minimize negative post abortion reaction, women should seek support from significant others, be apprised of procedures, familiar with alternatives and recognize costs.
Handy	1982	Women seeking termination demonstrated more psychological disturbance than other women. Few women found the decision to terminate easy.

Table 1. contd.

Study	Date	Major Findings
Deutsch	1982	Studied 96 pregnant teenagers. Never-pregnant adolescents manifested significantly higher measures for self-esteem than did first time and repeat abortion subjects. Repeat abortion adolescents showed significantly more signs of instability and personality conflict than the never pregnant group, as well as sex guilt. Teen aborters were more likely to come from families with father absent, marital conflict, poor patterns of communication, family enmeshment or disengagement, and to have lower self concepts.
Tollefson and Garvey	1983	Case analysis of the evolution of a woman's conversion disorder (urinary retention) in response to a decision to terminate pregnancy. Concluded that a variety of psychological disorders may go undetected concerning abortion and present themselves as "unrelated" physical complaints without organic basis.
Baker and Quinkert	1983	Data from 252 women who experienced reproductive problems (including abortion). Depression and increased stress were found which improved as the subjects learned more about the problem and drew closer to their families and others with similar problems.

Table 1. contd.

Study	Date	Major Findings
Cohen and Roth	1984	Of 55 women evaluated, the average level of post abortion stress was fairly high. Evidence indicated a "generalized stress response syndrome." "Avoiders" were found to experience more distress than "nonavoiders."
Bradley	1984	Women who had a prior abortion scored higher on levels of depressive effect in the third trimester of pregnancy and in the postpartum period.
Gold	1984	At four week follow up, abortion patients had poorer psychological adjustment than maternity patients; married abortion group reported less satisfying relationships with their husbands, and also reported poorer psychological adjustment.
Reardon	1986	Of 230 women studied, majority felt "forced" to have abortion; 83% felt "rushed" to make decision; 71% believed their abortion counselors were biased; 80% suffered chronic negative psychological sequelae; 19% reported suicidal ideation; and 20% reported chemical dependencies.

Table 1. contd.

Study	Date	Major Findings
Selby	1986	Presented data on 92 women treated on in-patient basis. Majority had been sexually abused in their past; post-abortion delayed reaction common; denial and depression experienced by most women; most had sexual adjustment issues and had experienced primary relationship termination. Identified post abortion trauma and helped women with their unresolved grieving through: denial, anger, bargaining, depression, guilt/shame, forgiveness, and reconciliation/acceptance.
Speckhard	1986	Found abortion a stressor event for most women interviewed and that delayed psychological complications occurred for most of the women studied 5-10 years post abortion. 85% were surprised by the intensity of their negative emotional reactions. 81% felt victimized by their abortions.
Wall	1986	Examined 34 women post abortion. Majority reported chronic emotional problems in the abortion aftermath, including guilt, depression, alcohol and drug abuse, difficulty in relationships, and anxiety in subsequent pregnancies. 26% reported making some suicidal gesture since their abortion.

PSYCHOLOGICAL STUDIES FROM TABLE 1 BY YEAR

Bracken & Suigar, *Factors Associated with Delay in Seeking Induced Abortions*, AM. J. OF OBSTETRICS AND GYNECOLOGY 301 (1972).

Osofsky & Osofsky, *The Psychological Reaction of Patients to Legalized Abortions*, 42 AM. J. OF ORTHOPSYCHIATRY 48 (1972).

Perez-Reyes & Falk, *Follow-up after Therapeutic Abortion in Early Adolescence*, 28 ARCHIVES OF GENERAL PSYCHIATRY 120 (1973).

Kaltreider, *Psychological Factors in Mid-trimester Abortions*, 4 PSYCHIATRY IN MED. 129 (1973).

Ewing & Rouse, *Therapeutic Abortions and a Prior Psychiatric History*, 130 AM. J. OF PSYCHIATRY 37 (1973).

Moore-Caver, *The International Inventory on Information on Induced Abortion*, International Institute for the Study of Human Reproduction (1974).

Bracken, Hachamovitch, & Grossman, *The Decision to Abort and Psychological Sequelae*, 158 J. NERVOUS & MENTAL DISEASE 154 (1974).

Lask, *Short-term Psychiatric Sequelae to Therapeutic Termination of Pregnancy*, 126 BRITISH J. OF PSYCHIATRY 173 (1975).

Evans, Selstad and Welcher, *Teenagers: Fertility Control Behavior and Attitudes Before and After Abortion, Childbearing or Negative Pregnancy Test*, 8 FAM. PLANNING PERSPECTIVES 192 (1976).

Greenglass, *Therapeutic Abortion and Psychiatric Disturbance in Canadian Women*, 21 CANADIAN PSYCHIATRIC ASSOC. J. 45 (1976).

I. Kent, Emotional Sequelae of Therapeutic Abortion, presented at 27th Annual Meeting of the Canadian Psychiatric Association, Saskatoon, September 1977.

Gerrard, *Sex Guilt in Abortion Patients*, 45 J. CONSULTING AND CLINICAL PSYCHOLOGY 708 (1977).

Bracken, *A Causal Model of Psychosomatic Reactions to Vacuum Aspiration*, 13 SOCIAL PSYCHIATRY 135 (1978).

Spaulding & Cavenar, *Psychoses Following Therapeutic Abortion*, 135 AM. J. PSYCHIATRY 364 (1978).

Cavenar, Maltbie, & Sullivan, *Psychiatric Sequelae of Therapeutic Abortion*, 39 N.C. MED. J. 101 (1978).

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AMICUS CURIAE

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No. 85-673

In The

Supreme Court of the United States

October Term, 1986

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NEIL F. HARTIGAN, Attorney General of the State of Illinois, et al.,

Appellants,

vs.

DAVID ZBARAZ, M.D. et.al.,

Appellees.

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On Appeal From The United States Court of Appeals For The Seventh Circuit

BRIEF OF AMICI CURIAE

Family Research Council
United Families Foundation
Family Life League
Pro-Life/Pro-Family Coalition
In Support of Appellants

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INTEREST OF THE AMICI

All four amici are involved in educational, clinical or counseling programs that encourage parental participation in the significant life crises in their children including their daughters who become pregnant. These programs are viewed with competitive disfavor by abortion clinics and counselors who, in the experience of the amici, undervalue the significance of parental counseling for pregnant teenage girls who are considering abortion. The counseling programs which amici support, encourage or operate will be severely weakened if the lower court decisions declaring the Illinois parental counseling statute unconstitutional are not overturned by this Court.

United Families Foundation (UFF) is an independent, nonprofit research and

educational foundation organized to educate the general public concerning the value of maintaining the family unit as the bedrock and strength of America, and to protect it from policies and practices that tend to fragment or weaken the family. Uff headquarters are in Washington, D.C.. UFF has more than 40,000 member-subscribers nationwide. **Family Research Council** (FRC) is an independent, non-partisan, non-profit research and education organization with headquarters in Washington, D.C. active to ensure that the interests of families are respected in the formulation of public policy. FRC maintains a research network composed of more than 1,000 academics, professionals, and researchers who provide information concerning the impact of proposed or existing public policies upon family integrity.

Family Life League (FLL) is a non-profit Illinois corporation dedicated to promoting and defending the interests and integrity of families. FLL operates numerous educational programs for adults and children supporting the values of family integrity, parental responsibility, and parent-child communication. FLL members participate in crisis pregnancy counseling services in which volunteers provide professional skill, support, and non-abortion services to pregnant teenage girls.

The **Pro-life/Pro-family Coalition** (PLPFC) is an association based in South Chicago, Illinois, consisting of ministers, priests, and leading lay members of more than 100 churches. PLPFC opposes the exploitive activities of many family planning programs in the Chicago area that exacerbate the centrifugal

pressures upon families of minorities and poor. Many of the ministers composing PLPFC are engaged daily in counseling pregnant teenagers and their parents.

Members of all four amici include numerous parents of teenage daughters who have been, are, or may become pregnant with unexpected pregnancies, whose parents earnestly desire the opportunity for consultation to benefit their children.

This brief is submitted to aid the Court that preserving the opportunity for meaningful parental consultation with a pregnant daughter who is considering abortion goes to the very heart of the family relation-ship upon which our nation is founded. Few would suggest that a minor would be deprived of her constitutional rights by statute preserving the opportunity for meaningful counsel by the guardian of her property.

Like-wise, denial of the opportunity for meaningful parental counsel prior to an abortion is not in the best interests of the minor, families or society.

The written consent of the parties to the filing of this amicus brief has been filed with the Clerk of Court pursuant to the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

The decisions of the lower courts in this case, if upheld, will render this Courts' holding in H.L. v. Matheson a dead letter. H.L. upheld a statutory requirement of parental notification to promote parental consultation. The decision in H.L. presumed that parental consultation would occur. The Illinois statute merely protects that presumption by providing a minimum opportunity (24 hours) for parental consultation.

The core teaching of Roe v. Wade is that some matters must be left to the private sphere. The decrees entered by the lower courts in this case constitute forbidden governmental intrusion into the oldest "zone of privacy" recognized by this Court -- parental authority to raise their children.

It is a transparent fiction to pretend that the Constitution dictates concerning the regulation of domestic relations. The lower courts in this case transgressed the separation of powers when they assumed the responsibility to dictate that teenagers are automically emancipated when they become pregnant. The regulation of domestic relations is the virtually exclusive province of state legislatures.

The explosion of adolescent abortion is a national tragedy. Unless they are required to notify their parents, half of

all adolescents seeking abortion will not consult their parents because they are victims of their own exaggerated fears.

There is tremendous support in professional literature for the determination of the Illinois legislature that preabortion parental counseling is in the best interest of minors. Pregnant adolescents have a profound need for guidance and direction from their parents. Pregnant teenagers have substantial conflicts, anxieties and vulnerabilities.

Parental counsel can reduce some of the medical risks of adolescent abortion and alleviate the substantial emotional and psychosocial harm which confront the pregnant adolescent.

The relationship between parents (particularly mothers) and pregnant daughters is critical to the pregnant adolescent coping with an abortion.

Parental consultation encourages subsequent parental support and alleviates isolation, alienation, etc. Absent parental participation in the abortion decision, there is enhanced risk of "replacement pregnancy" and multiple abortions for adolescents.

The "counseling" available to adolescents in abortion clinics is facetious at best; it is raw exploitation of troubled minors by often-equally disturbed women, for profit. Absent parental consultation, minors are heavily influenced by bad advice from peers.

Parental consultation protects the constitutional interests of parents and families. It strikes a balance between the interests of parents, minors, and society.

ARGUMENT

I. To Uphold The Lower Courts' Decision Invalidating The Illinois Parental Notice Abortion Act Would Render H.L. v. Matheson An "Empty Formalism."

A. This Court Upheld The Constitutionality Of State Laws Requiring Reasonable Parental Consultation in H.L. v. Matheson.

This case is governed squarely by the Supreme Court's decision five years ago in H.L. v. Matheson, 450 U.S. 398 (1981), upholding the constitutionality of the Utah statute requiring the doctor intending to perform an abortion on a minor to "[n]otify if possible, the parents or guardian of the minor," Utah Code Annotated §76-7-304 (1978). The Court observed that "[t]here is no logical relationship between the capacity to become pregnant and the capacity for mature judgment considering the wisdom of

an abortion." Id. at 408. Reiterating a point made by a plurality in Belotti v. Baird (II), 443 U.S. 662 (1979), the Court emphasized that:

> A State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision--one that for some people raises profound moral and religious concerns...
>
> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bare a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

450 U.S. at 410. The Court further emphasized "that parents have an important 'guiding role' to play in the upbringing

of their children,... which presumptively includes counseling them on important decisions." Id. The Court noted that the Utah statute gave "neither parents nor judges a veto power over a minors' abortion decision." Id. at 411. And the Court agreed that the statute significantly furthered the substantial state interests of fostering family integrity and protecting adolescents from their own immaturity and unwise judgment. Id. "That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." Id. at 413.

Ironically, the very faction now challenging Illinois' statute, designed to

precisely define the opportunity for parental consultation, argued in H.L. that the Utah law was unconstitutinal because it did not "provide for a mandatory period of delay after a physician notifies the parents..." Id at 412. However, the Court brushed aside that make-weight argument then, as it should the negative-duplicate of it now, because "[t]he...statute is reasonably calculated to protect minors...by enhancing the potential for parental consultation concerning a decision that is potentially traumatic and permanent consequences." Id.

This Court assumed in H.L. that the requirement of notification would entail parental consultation and involve some period of delay. Thus, the Court in its opinion referred to the purpose of its

statute and its primary justification as to achieve "parental consultation."[1] The Court expected that parents would spend some time with the minor seeking an abortion to exercise their "guiding role... which presumptively includes counseling on important decisions." Id. at 410. And the Court referred to the need for "adequate counsel and support" from parents and others outside the abortion clinic. Id. at 410. Moreover, the Court noted that "[a]t least five States have enacted parental notification statutes containing brief mandatory waiting periods." Id. at 412 n.21.

1 450 U.S. at 409, 412. The Court noted that the Utah statute would provide parents with an opportunity to "provide medical and psychological data, refer the physician to other sources of medical history, such as family physicians, and authorize family physicians to give relevant data," 450 U.S. at 411, all of which would take some time. See further Id. at 419 (Powell, J., concurring) ("facilitating consultation"); id. at 422-24 (Stevens, J., concurring) ("consultation," etc.)

Thus, the Court in H.L. clearly and unequivocally approved of statutes which reasonably delay the performance of abortions upon pregnant minors in order to encourage and facilitate parental consultation prior to abortion.

B. The Lower Courts' Decisions Invalidating The Illinois Consultation Provision Render H.L. An "Empty Formalism."

Several lower courts have relied in good faith on the decision in H.L. to sustain the validity of laws similar to Illinois'. In three separate opinions in two cases in Ohio and Minnesota, federal courts have specifically relied on H.L. in affirming the concept of statutory waiting periods applicable to minors. In Akron Center for Reproductive Health v. Rosen, 633 F.Supp. 1123 (N.D. Ohio 1986) Judge Ann Aldrich underscored the dispositive

point when she explained "the notification procedure in which the Supreme Court explicitly upheld for some minors in Matheson would be an empty formalism with no practical effect if the abortion could proceed before the parental consultation could take place." Id. at 1139. In that case, Judge Aldrich upheld the 24 hour waiting period applicable to minors designed to achieve parental participation in the abortion decision of the minor.

In Hodgson v. Minnesota, 3-81 CIV 538, Slip op. at 53-54 (D. Minn. Nov. 6, 1986) Judge Alsop agreed "that a notification requirement would be an empty formalism without practical effect if the abortion could proceed before the parental consultation could take place." Id. at 54-55. Because of the "logistical obstacles" facing Minnesota women who live in rural counties the court invalidated

Minnesota's 48 hour waiting period as excessive. Nevertheless, the court specifically held:

> Some period of mandatory delay between the time of actual or constructive notification of the minors' parents and the abortion itself would reasonably effectuate the State's interest in protecting minors. A waiting period may allow parents to aid, counsel, advise, and assert minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved.

Id. at 30; see also id at 55.

See also Id. at 53, citing Hodgson v. Minnesota, CIV. No. 3-81-538, Slip op. at 5 (D. Minn. March 22, 1982).

The courts which have invalidated similar requirements have tacitly read City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) as overruling H.L.. See Zbaraz v. Hartigan, 584 F. Supp. 1452 (N.D. Ill. 1984), aff'd in part 763 F. 2d 1532 (7th

Cir. 1985); see also Indiana Planned Parenthood Affiliates Ass'n, v. Pearson, 716. F. 2d 1127, 1143 (7th Cir. 1983). But Akron endorsed H.L., 462 U.S. at 441, and did not contradict. H.L.[2]

C. The Lower Courts' Decision Contradict The Fundamental Principle of Roe v. Wade.

2 In Akron, the Court struck down an ordinance which imposed a 24 hour waiting period on all women, regardless of age, who had given their written consent to obtain an abortion, 462 U.S. at 416. The purpose of the waiting period was to ensure "careful consideration" by all women of all the facts upon which the abortion decision might be based, not to foster families ties, or protect the best interests of minors. The Court invalidated the Akron ordinance because the city "failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period." Id. The state did not assert the interests which are the fundamental interests served by the Illinois statute--the interest of families, parents, and minor children. The Court also invalidated a requirement of parental consent for very young teens because it gave parents an absolute "veto" and provided no exceptions. Consultation does not create a parental veto.

The decision of the lower courts in this case directly contradicts the core principle of Roe v. Wade, 410 U.S. 113 (1973). If Roe stands for nothing else it stands for the principle that some private matters are beyond the scope of direct government regulations; that some fundamentally important decisions must be left to non-governmental decision makers--private institutions and individuals.

The oldest branch of the constitutionally-protected doctrine of privacy concerns family privacy--the authority of parents to exercise childrearing perogatives within their homes free from government intrusion. Myers v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

The suit by the appellee abortion clinics and agents in this case is a bold

attempt to invoke the force of judge-made law to interfere with parent-child relations and to reallocate decision-making regarding minors in a manner that would give them much greater influence. They seek the coercive aid of jucicial decree to allow them to dictate that parents must emancipate their minor daughters whenever they become pregnant. Federal judicial decrees are as fully a form of governmental intervention as legislative or administrative decrees. The judiciary has no more power to intrude into family privacy than any other branch of the government. See, e.g., Parham v. J.R., 442 U.S. 584 (1979); Palmore v. Sidoti, 104 S. Ct. 1879 (1984).

D. The Lower Court's Decisions Improperly Failed To Defer To The State.

The decisions of the lower Court's transgressed the constitution principle of federal court deference to the states, particularly state legislatures, in matters pertaining to domestic relations. "Regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states." Sosna v. Iowa, 419 U.S. 393, 404 (1975). See further, Lehr v. Robertson, 463 U.S. 248 (1983); Lehman v. Lycoming County Children's Serv., 458 U.S. 502; Ex Parte Burrows, 136 U.S. 586 (1890); Barber v. Barber, 21 How. (62 U.S.) 582 (1858).

It is inappropriate for federal courts to act as a "Federal Bureau of Abortion Administration" to supervise with exacting jealously the finest details of state legislation which attempts to balance the constitutional interests of parents and children. The ultimate question in this

case is one of emancipation--whether parents must emancipate their minors when they become pregnant. That is not an issue regarding which federal courts have any particular expertise.

> [B]ecause children's interests are often indeterminant, judges may have no better insight than legislators about what policies are best for children. Moreover, unlike legislators, judges are not directly accountable to voters. In the absence of superior judicial insight incompetence, judicial rejection of legislative choices is extremely troubling.

R. Mnookin, In The Interests of Children 26 (1985).

E. The Lower Courts' Decisions Invalidating The Illinois Consultation Provision Are Inconsistent With Other Decisions Of This Court Dealing With Abortions On Minors.

This Court has shown special concern regarding the provision of abortion services to minors. The Court has

consistently emphasized that laws regulating the provision of abortion services to minors come before it with a stronger presumption of constitutionality because of the unique situation of minors, and because of the particularly profound state interests that are affected which are not implicated when abortions are performed upon adult women.

When the issue of state regulation of abortion services provided to minors was directly presented to the Court in Planned Parenthood v. Danforth, 428 U.S. 52 (1975), the Court emphasized that "the State has somewhat broader authority to regulate the activities of children than adults." Id. at 74. The Court acknowledged the profound state interests in "the safe guarding of the family unit and of parental authority." Id. at 75. The Court invalidated the Missouri

statutory requirement of parental consent because it gave the parents an absolute "veto power" over the decision of a minor to have an abortion. Id. Nevertheless, the Court emphasized that its decision "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." Id. In a concurring opinion, Justices Stewart and Powell declared:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice and help of her parents in making the very important decision whether or not to bear a child. That is a grave decision and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic...."

428 U.S. at 91.

In Maher v. Roe, 432 U.S. 464 (1977) the Court tacitly approved of state-

required parental consultation before abortion when it drew a distinction between laws providing "parental veto over the minor's abortion decision [and] the less burdensome requirement of parental consultation." Id. at 473.[3]

In Belotti v. Baird (II), 443 U.S. 662 (1979) this Court held that a Massachusetts "judicial consent" statute was invalid. Four members of the Court thought that the defect of the statute was that it required parental notification in all cases. Id. at 643,644. Four other justices, in an opinion authored by

3 Indeed, the Court could say of legislation requiring an opportunity for parental consultation what it said in Maher of legislation prohibiting the funding of electing abortions--that it "places no obstacles--absolute or otherwise--in the pregnant women's path to abortion.... The indigency [or adolescent's anxiety] that may make it difficult in some cases impossible--for some women to have abortions is neither created nor in anyway affected by the ... regulation." 432 U.S. at 474.

Justice Stevens, suggested that mere parental notification in all cases was not inappropriate, but that the statute was defective because it gave a third party--either the parent or the judge--"an absolute veto over the minors' decisions...." 443 U.S. at 654. All members of the Court agreed that parental participation in abortion decisions of minor daughters was substantially important. Id. at 634-42 (Powell, J.); Id. at 656 n.4 (Stevens, J.); Id. at 657 (White, J., dissenting), and that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." Id. at 637. See further Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983). The consistent thread in these cases is recognition of the profound significance to the minors' well-being of parental

participation in the abortion decision unless it can be clearly demonstrated (not merely speculated) that the participation of the specific parents of a particular child would directly and substantially injure the interests of that child. Nothing in the precedents suggests that reasonable parental consultation is not in the best interests of minors.

II. The Illinois Parental Consultation Provision Substantially Enhances The State's Profound Interest In The Well-Being of Pregnant Adolescents.

A. A Profile of Teenage Abortion--Cause for National Concern.

"Abortion has become an important means of birth control for teenagers...." The abortion rules for minors, therefore, obviously affect broader social concerns. **R. Mnookin, In The Interests of Children** 156 (1985). Nearly 200,000 abortions are

performed every year on minors age 17 or younger, including more than 15,000 on girls 14 years old or younger.[4]
More than forty percent (40%) of all teenagers who have known pregnancies (birth or abortion) obtain abortions.[5]

Eighty percent (80%) of all abortions performed on teenagers are done in abortion clinics.[6] More than half of the

4 Henshaw, Benker, Blaine & Smith, A Portrait of American Women Who Obtain Abortions, 17 **Fam. Planning Perspect.** 90, 92 (1985).

5 Id. at 93. This is sixty percent (60%) higher than the abortion ratio for teenagers in 1973, the first year of abortior-on-demand. Russo, Adolescent Abortion: The Epidemiological Context in **Adolescent Abortion** at 40, 49, (G. Melton ed. 1986). Teenagers delay obtaining abortions longer than more mature women. Id. at 56-57.

6 Id.; Henshaw & O'Reilly, Characteristics of Abortion Patients in the United States, 1979-1980, 15 **Fam. Planning Perspect.** 5,11 (1983).

abortion clinics do not require parental notice even for teenagers 15 years of age or younger; even fewer require parental notification before performing abortions on minors age 16 or older.[7] Nearly half (45%) of the 1,170 teenage abortion patients interviewed admitted that their parents did not know they were obtaining an abortion. Half of these teenagers said that they would notseek an abortion if they had to notify their parents. Id. at 287-89.

B. Without Mandatory Parental Notification Half of the Minors Obtaining Abortion Will Not Consult Their Parents.

It is a myth that only minors from "bad" homes seek secret abortions without

7 Torres, Forrest & Eisman, Telling Parents: Clinic Policies And Adolescents' Use Of Family Planning An i Abortion Services, 12 **Fam. Planning Perspect.** 284-86 (1980).

consulting their parents. H.L., 450 U.S. at 423-24 (Stevens, J., concurring). In fact, it appears that the families of the average teen seeking abortion are more stable than those of pregnant teenagers not seeking abortion.[8]

Adolescents typically perceive that their relationships with their parents are poor.[9]

Discussion with parents regarding sex-related problems is especially difficult for teenagers.[10]

When peer-parental cross-pressures arise for adolescents, they typically attempt to

8 Olsen, Social And Psychological Correlates of Pregnancy Resolution Among Adolescent Women, 50 Am. J. Orthopsychiatry 432,37 (1980).

9 E. Hurlock, Adolescent Development 297 (4th ed. 1973); Adams, An Introduction To Understanding Adolescents, in J. Adams, Understanding Adolescents 6 (1968).

10 R. Sorensen, Adolescent Sexuality In Contemporary America 67-79 (1973).

resolve (avoid) the conflict by simply not communicating with their parents. Brittain, supra at 390, 391. "Almost without exception, younger women did not like to tell their parents. They fear parental reaction of shame or disappointment or a threatening posture." Butler & Fujita, Abortion Screening and Counselling: A Brief Guide for Physicians, 50 **Post Grad. Med.** 208, 212 (1971). Adolescents typically overestimate the negativity of their parents rejection or disappointment.[11] "In most situations, parents and teenagers can agree on what to do about an unplanned

11 Furstenberg, The Social Consequences of Teenage Parenthood, 8 **Fam. Planning Persp.** 148 (1976); Miller, Adolescents And Authority **Adolescence The Crisis of Adjustment** 74 (1975); Baird v. Bellotti, 450 F. Supp. 997, 1012 (D. Mass. 1978)(Jullian, J., dissenting) (adolescent fears of parental rejection seldom realized).

pregnancy."[12] Studies have consistently shown that one-half of all teenagers who seek abortions will do so without any parental knowledge, if they have that option.[13] One researcher who studied the issue extensively estimated that in just six and one-half years 10,000 unmarried minors in Massachusetts obtained abortions without parental consultation.[14]

12 Authier & Authier, Intervention With Families of Pregnant Adolescents in **Pregnancy in Adolescence** 107, 175 (1982); Rosen, Benson & Stack, supra n. ___ at 279.

13 Torres, supra at 287-89 (45% concealed abortions); Rosen, Benson & Stack, Help or Hinderance: Parental Impact on Pregnant Teenagers' Resolution Decisions, 31 **Fam. Rela.** 271 (1982) (43% secret abortions) ; **R. Mnookin,** supra at 158, (estimates that "over one-half" get secret abortions).

14 Id. at 237. Professor Mnookin describes how parental notice requirements are routinely evaded by abortion clinics. Id. at 239.

Teenagers are much more likely to seek advice from their boyfriends and girlfriends than their parents.[15]

C. Pregnant Adolescents Need Parental Guidance.

Parental consultation is critical for minors considering abortion because "minors often lack the experience, perspective and judgment to avoid choices that could be detrimental to them."[16]

15 Clary, Minor Women Obtaining Abortions: A Study of Parental Notification In A Metropolitan Area, 72 Am. J. Pub. H. 283, 284 (1982) (71% informed best friend; 37% informed mothers; 26% informed fathers); Klerman, Bracken, Jeckel & Bracken, The Delivery-Abortion Decision Among Adolescents in **Pregnancy in Adolescents** 219, 29 (1982).

16 Bellotti (II), 443 U.S. at 635. The ability to reason abstractly and foresee consequences, which is so important to making such a decision, is absent in many teenagers. Eisen, Zelman, Leibowitz, Chile & Evans, Factors Discriminating Pregnancy Resolution Decisions of Unmarried Adolescents, 108 **Genetic Psych.** 69, 94 (1983).

Adolescence is a time of transition from dependency of childhood to the independence of adulthood. "Guidance is essential if the transition is to be made successfully and with minimum psychological damage." E. Hurlock, supra at 15. Unlimited freedom adds to the adolescent's already-present feeling of insecurity. Id. at 256. J. Gallagher, F. Heald and D. Garrell, Medical Care of the Adolescent 243 (3rd ed. 1976).

Adolescents have a particular need for adult guidance in areas in which they have no childhood experience to guide them. E. Hurlock, supra at 252. And making a decision about abortion is extremely difficult.[17]

17 It is difficult enough for adult women. Freeman, Abortion: Subjective Attitudes and Feelings, 10 Fam. Plng. Persp. 150, 152 (1978), reported:

"Most women [studied] experienced their abortions with some degree of conflicting emotions.... The largest proportion of the 106 followed-up respondents (24%) reported that the

(Footnote 17 continued on next page

Ambivalence and confusion regarding the abortion decision are even greater for adolescents than they are for adult women. For example, Horowitz reports:

> The decision to have an abortion was not an easy one. . . . One of the young women admitted getting off the table at the abortion clinic before the procedure began. Another was not told that she was having an abortion and was confused about what was occuring. . .
>
> Attitudes about the acceptability of
> (Footnote 17 continued from previous page)
> hardest part of the experience was with contending with feelings of loss of a child (although the participating clinics stressed 'fetus' and avoided the word 'child'). Other women (14%) found making the decision the hardest part of the experience. Also difficult (for 13%) was waiting for the abortion to be performed. ... Another group (11%) described loneliness as the most difficult part of abortion. A fifth group (7%) struggled with self-acceptance."
>
> This study further noted: "For many, the abortion decision contradicted their perceptions about themselves." Moreover, "Sixty eight percent reported experiencing anxiety symptoms between pregnancy and abortion; 48% reported depressive symptoms. Four months after the abortion, 14% reported anxiety symptoms; 13% depressive symptoms." Id. at 152, 153.

> abortion also demonstrate the ambivalence of many [adolescents] who had abortions. Looking back to the time before the abortion, less than one-half approved of abortion at that time. . . . Less than one-quarter approved of it after the abortion. Horowitz, Adolescent Mourning Reactions to Infant and Fetal Loss, 59 **Social Casework**, 551, 557 (November 1978). See further Babikan & Goldman, A Study in Teenage Pregnancy, 128 **Am.J. Psychiat.** 755 (1971); **L. Francke, The Ambivalence of Abortion** 180 (1978); Olson, supra at 437-41.

One study found that "[a]lmost one-third of the young women (31.8%) changed their minds once or twice about continuing the pregnancy or having the abortion, 18% changed their mind even more frequently."[18]

18 Klerman, Bracken, Jekel & Bracken, supra at 219, 227. Wallerstein, Kurtz, and Bar-Din Psychological Sequelae of Therapeutic Abortions in Young Unmarried Women, 27 **Arch. Gen. Psychiat.** 828(1972), reported that nearly 60% of the young women studied reported conflict regarding the abortion decision. (For nearly 20% "a central emotional issue revolved primarily around their deception of their families and the burden of secrecy." Id. at 829.) They also reported that "an overwhelming number ...reported experiencing moderate to severe emotional distress during the

(Footnote 18 continued on next page

The opportunity for parental guidance afforded by parental consultation is substantially related to reducing these anxieties.

The fact that the abortion decision is of constitutional significance underscores the importance of the decision, and the need for guidance. The "relatively uninformed nature of the decision" of adolescents regarding unplanned pregnancy has been documented.[19] Moreover,

(Footnote 18 continued from previous page)
period of the pregnancy." Id.

19 Klerman, Bracken, Jekel & Bracken, supra at 233. Teenagers who choose abortion typically had more difficulty with the decision than pregnant teenagers who reach other decisions. Id. at 231. They typically talk with fewer people and receive substantially less counselling than pregnant teenagers choosing to keep their baby or give it up for adoption. Id.; Paulsen, Correlation of Outcomes of Premarital Pregnancy, 18 **Fam. Persp.**, winter 1984, at 25, 29.

adolescents who choose abortion typically make that decision much more hastily (in nine days) than teens who choose to keep the baby (56 days) or give it up for adoption (more than 100 days). Id. at 28.

While consulting parents about the embarrassing problem of unwanted pregnancy may be a cause of temporary stress for the pregnant minor, it prevents even more stress in the long run. Adolescent aborters who "avoid" facing the difficulties of the abortion decision experience more stress than "non-avoiders."[20]

D. Parental Consultation Reduces The Physical And Psychological Risks Of Abortion For Minors.

Parental participation in the abortion decision of a minor is extremely important

20 Cohen, Lorry, Roth & Susan, Coping With Abortion, 10 J. Human Stress 140, 142 (1984); J. Burtchaell, Rachel Reeping And Other Essays On Abortion 42 (1982).

because of the substantial risks associated with abortions for minors. The physical health risks of abortions for minors are well-known to the Court. H.L., 450 U.S. at 412 n.20.

The risks to the emotional and psychological well-being of the adolescent are even more profound. "Compared with adults, adolescents appear to have somewhat more negative responses on average following abortion."[21]

21 Adler & Dolcini, supra at 84. Among women generally: "The ambivalence about pregnancy termination continued after the procedure. Subsequent to their abortions, 65% of the women 'didn't know' if they would choose abortion again if unwanted pregnancy occurred. Only 22% believed they would do so; 13% stated they would have an unwanted child." Freeman, supra at 152. Four months after the abortion experience, 40% of the women studied "continued to be troubled or regarded their abortions as too upsetting to think about." Id. at 53. Seven percent of them said they regretted the abortion decision, and an additional six percent said that they would never have an abortion again. Id.

One study reported that two-thirds of the adolescent pregnant patients "showed intense dependency needs". Babikian and Goldman, A Study in Teenage Pregnancy, 128 **Am.J. Psychiat.** 755, 759 (1971). Another study reported that nearly one-third of the young women who had abortions

> showed moderate to considerable decline in psychosocial functioning five to seven months postabortion as measured from the baseline of their reported adequate pre-pregnancy status. These young women, at initial follow-up, were suffering with a variety of specific symptoms of maladaptive behavior including mild to moderate depressive episodes, a variety of new physical complaints for which medical attention had not been sought. . . . difficulty in concentrating in school, withdrawal from previous social contacts, lowered self-esteem explicitly related to the pregnancy and abortion experience, a newly begun promiscous pattern in relationships with men, and regression to more infantile modes of relationships with parents. These difficulties did not predate the pregnancy.[22] The authors observed

[22] Wallerstein, et al., supra at 830 (cited in H.L., 450 U.S. at 412 n.20). Adolescents with previous emotional difficulties "were found to be chronically distressed, in continued

(Footnote 22 continued on next page

"that the young women in our study have only a 50% chance of having mastered the pregnancy and abortion experience to the point of adequate closure and reconstruction of the previous state of psychosocial functioning at five to seven months post-abortion." Id. They concluded: Our single most striking set of findings relates to the effects of the pregnancy and abortion experience upon the younger adolescents in the 14-17 year age span. Consequent symptom manifestations, even when only transient, tended to be more dramatic and more severe in this younger group. . . Even more, we were struck by the more pervasive long-range effects of the pregnancy and abortions experience upon these particular young women. . . . Overall it is clear that the pregnancy and abortion experience in the younger and less mature is considerably heightened risk, a point of potential major maturational skewing.[23]

(Footnote 22 continued from previous page) poor psychosociological health, and additionally burdened by the open, unassimilated pregnancy and abortion experience which they weemed unable to integrate." Id. at 831.

23 Id. at 832. (emphasis added). See also Perez-Reyes and Falk, Follow-up After Therapeutic Abortion in Early Adolescence, 28 Arch. Gen. Psychiat. 120, 124 (1973).

The risk of teen suicide following abortion, in severe cases of "anniversary reaction," has been noted.[24]

One of the particular difficulties for adolescents is the problem of dealing with the very real sense of loss after an abortion is performed. Horowitz, supra. Successfully coping with the sense of loss is tramatic enough.[25]

24 Tishler, Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction, 68 **Pediatrics** 670 (1981).

25 Horowitz reports:

> The young woman's initial period of shock and denial of the loss is normally followed by reactions such as fantasising about the baby; expressing the need to see if it is possible to have another child; feeling guilty about her own role in the loss; feeling angry toward the hospital personnel, family, or the baby's father; and having somatic reactions. These responses are sometimes followed by a period of pain and despair, in which apathy is common. A teenager may show a lack of caring for herself and her future. This sometimes serves as punishment for her perceived role in the loss.
>
> Horowitz, supra at 553.

However, non-adaptive or pathological mourning (failing to cope) is even more difficult.

> Typically, non-adaptive responses are exaggerations or the persistence of mourning reactions. Some of these reactions include the absence of mourning and continued inability to discuss the loss; persistent abnormal affective stages such as extreme and enduring anger, guilt, or depression; or new or exaggerated self destructive acting out.

Id. at 553. Less than one-fourth of the adolescents aborters observed in one study completed the healthy adaptive mourning process. Id. at 155.

> They tended to conceive again soon after the termination of the previous pregnancy. Many of the young women showed few mourning reactions, perhaps because of a fear of being overwhelmed by their responses and because few others supported their expression of these feelings.

Id. at 558. The report concluded:

> Working through a loss is often a painful process, but failure to do so increases the likelihood that feelings about this loss will influence a young woman's feeling about herself, a subsequent child, and future separations and losses. . . Working

> through a loss can be difficult, while becoming pregnant again may seem to be a simple solution. Young women need supportive help, help acknowledging and expressing their grief, if they are to take this more difficult route of dealing with their loss.

Id. at 559.

Adolescents who do not fully address this emotional problem face greater risk of subsequent pregnancy.

> Conceiving again at a median of. . . nine and one-half months for the Abortion Group suggest that many may have had difficulty accepting the previous loss. Twenty five said that they purposely became pregnant again as a replacement of the previous loss. Thirteen did not admit planning the subsequent pregnancy, but avoided contraception even though they were aware of the consequences of doing so.

Id. at 556. See also id. at 558, 559. And this leads to the tragic cycle of "replacement pregnancies" and multiple abortions. (See infra Part E.)

In light of these risks, parental consultation directly baenefits to the minor. It is indirectly of enormous

significance also, because parents can provide a physician performing abortion with medical and psychological history, etc. 450 U.S. at 412.

E. Parental Consultation Fosters A Relationship That Is Critical To The Well-being Of Adolescents.

"Children do have rights, among which is the right to a functionally strong family."[26]

By providing realistic opportunity for at least minimal parental consultation the Illinois law fosters a relationship that is essential to the well-being of adolescents. The need for independence (identity) from parents is the primary drive during adolescence and this conflicts with the need for parental

26 P. Berger & R. Neuhaus, To Empower People: The Role of Mediating Structures In Public Policy, 20, 21 (1977).

direction. I. Josselyn, Adolescence 40 (1971). Tension between parent and adolescent is natural, necessary and reaches its peak when the adolescent is between 15 and 17. E. Hurlock, supra at 297. Because of this conflict, parental relations with their adolescent daughter are the most important relations she has during this time.[27]

> Parents often provide the psychological terrain upon which the adolescent struggles to find himself. They, in spite of the adolescent's periodic rejection of them, are typically the most important people in any individual's life during the period of maturation.... Because parents are so important they are the people with whom the adolescent has the most conflictual relationships.[28]

Conflict between parents and their adolescent daughters "is unpleasant, but it is a necessity if the adolescent is to

27 D. Ausubel, R. Montemayor and R. Sujian, Theory and Problems of Adolescent Development 483 (3rd ed. 1980); J. Horrocks, The Psychology of Adolescence 42 (2nd ed. 1962).

28 I. Josselyn, supra at 35.

develop a healthy maturity".[29] Communication and shared experiences are the two principal factors affecting the relationships between an adolescent and her family.[30] "Court or agency intervention [including family planning agencies, and abortion clinics--LDW] without regard to or over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming and being an adult in his [or her] own right."[31] Ironically,

29 J. Gallagher, et al., supra at 243; see also Miller, supra at 74.

30 E. Hurlock, supra at 299, 300.

31 Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L.J. 645, 650 (1977). See further J. Goldstein, A. Freud and A. Solnit, Before The Best Interests of the Child 101-106 (1979).

efforts to shield a pregnant minor from parental participation appear to be responsible, at least in part, for the tragic syndrome of replacement pregnancies and multiple-abortions among teenagers.[32] One study showed that 17% of the women under 18 who had abortions were pregnant again within one year.[33] Another study showed that 41% of adolescents who had

32 More than 35% of all abortions are obtained by women who have previously had one or more abortions. Henshaw, Benker, Blaine & Smith, supra at 92. When the abortion-repeater rate was only 25%, the percentage of teenagers obtaining abortions who previously had an abortion was estimated to be 0% for girls aged 14 and under, and rises by 5% with every age-year until 25% of the teenagers aged 19 having abortions had previously had one or more abortions. Teitze, Repeat Abortions: Why More, 10 **Fam. Plng. Persp.** 205, 286 (1978).

33 Steinhoff, et al., Women Who Obtain Repeat Abortions: A Study Based on Record Linkage, 11 **Fam. Plng. Persp.** 30, 37 (1979).

therapeutic abortions had resumed sexual intercourse six months later, more than two thirds of whom were then doing so without contraceptives. Perez-Reyes, et al., supra at 123. The implication of parental participation for this specific problem is explained by Horowitz:

> A major task of adolescence is the detachment from parental figures. There are similarities between the course of this separation and the mourning process [that follows abortion]. . . . 'Normal adolescent mourning,' as Max Sugar calls the process of separating from parental figures, makes adolescents vulnerable to other losses. Some loss of support to the adolescent ego and superego have already resulted from this process. With further losses, the threat to an adolescent's identity can be strong.

Horowitz, supra at 552. (emphasis added). Abortion without parental consultation involves a severe double "loss" for the adolescent whose compensatory response very often appears to be to become pregnant again.

F. Parental Consultation Increases The Prospects For Parental Support Which The Minor Desperately Needs.

It is undisputed that minors need emotional support during and after the abortion experience is obvious.[34]

Clinical experience has shown that openness with parents about the predicament, especially if initiated by the patient, has a better chance of eliciting emotional support, something the patient may desperately need. Butler and Fujita, supra at 212.

34 Id. at 558, 559; Spaulding and Cavenar, Psychoses Following Therapeutic Abortion, 135 **Am. J. Psychiatry** 364 (1978); Butler & Fujita, Abortion Screening And Counselling: A Brief Guide For Physicians, 50 **Post Grad. Med.** 208, 212 (1971); Hanson, supra at 1180, 1181; American Academy of Pediatrics, Pregnancy and Abortion Counselling, 63 **Pediatrics** 920, 921 (1979); Perez-Reyes, supra at 126. See further J. **Gallagher**, supra at 52, 64.

Parental consultation will reduce the likelihood of the isolation of the minor during the difficult decision process. See supra at pp. Suicide is the third leading cause of death among teenagers. Adler & Dolcini, supra at 84. Isolation is the prime cause of suicide among adolescents. J. Gallagher, supra at 244. And loneliness is one of the principal emotional problems encountered by women who obtain abortions. Attempted suicide by adolescents on the anniversary of abortion has been documented. Tischler, supra. Parental consultation will help this problem.

The majority of abortions now are performed in the unfamiliar surroundings of clinics where minors are furtive, frightened visitors subjected to assembly-line techniques. See Planned Parenthood, 428 U.S. at 91, 92 n.2 (Stevens, J.,

concurring with Powell, J., joining). The legally-protected opportunity for consultation by parents, who usually have powerful ties of blood and love, and who will have an ongoing, important relationship with minors for years after abortion clinic personnel have collected their fees and ceased to deal with the minor, substantially effectuates the state's interest in the well-being of minors.

At least some, if not most, parents who would not be consulted absent a requirement like Illinois', will provide emotional and psychological support for their daughter's decisions respecting their crisis pregnancy. Authier & Authier, supra. Even if parents and daughter do not end up with the same views, alienation resulting from a daughter taking an irreversible,

unilateral, clandestine step will be avoided. Thus, the parental notification requirement will directly enhance the psychological well-being of a significant numbers of minors.

G. Parental Consultation Helps Protect Vulnerable Minors From Exploitation.

Parental consultation is necessary to protect minors against their "peculiar vulnerability". Bellotti (II), 463 U.S. at 3043. Pregnant teenage girls are particularly vulnerable to the guiles of clinics offering "quick fixes," and to the influence of their peers.

The parties attacking the Illinois parental consultation provision are engaged in the business of offering abortion services and giving "counsel" to pregnant women, including teenagers. Obviously, they have a direct conflict-of-

interest (profit) when it comes to giving counsel to frightened teenagers who have unplanned pregnancies.

The typical abortion "counselor" has such a personal psycho-social stake in abortion that she could not give meaningful, objective counsel, even if she were expected to. Two recently-published series of interviews by Pro-Abortion authors succinctly summarized in J. **Burtchaell**, supra at 41-44, underscore how misleading it is to even apply the term "counseling" to the promotional job provided by abortion staffers. Most "counselors" have had abortions themselves. Many are burdened with unresolved psychological guilt. Id. at 41-42. Abortion "counselors" exploit the natural centrifugal pressures that make communications between adolescents and parents difficult, and are willing to

weaken whatever remains of the parent-child link of honest interaction to promote abortion.[35]

35 Family planning programs "are more efficient at convincing teens to avoid birth than to avoid pregnancy." Weed, Curbing Births Not Pregnancies, The Wall St. J., Oct. 14, 1986, at 36, Col. 4. Despite a massive, government-financed campaign that has increased the provision of family planning services to teenagers by 600% in twelve years (in 1980 30% of all teens were involved in family a planning program), and despite predictions by family planners that the rate of pregnancy among teenagers would drop by 200--300 pregnancies for every 1000 teenagers involved in family-planning programs, Olsen & Weed, Effects Of Family Planning Programs For Teenagers On Adolescent Birth And Pregnancy, 20 **Fam. Persp.** 153, 157-61, recent research found "a net increase of about 100 pregnancies" for every 1000 teenagers using family planning services. Id. at 160, 161; Weed & Olsen, Effects Of Family-Planning Programs On Teenage Pregnancy--Replication And Extension Rates, 20 **Fam. Planning** 173, 190 (1986). And instead of reductions of more than 150 abortions per 1000 teenagers using family planning services, predicted by family planners Weed & Olsen found that the rate of abortion increased by more than 100 per 1000 teenage family planning clients. Weed, supra at 36; Olsen & Weed, supra at 161-64,67; Weed &

(Footnote 35 continued on next page

"[A]t the abortion clinic you aren't really expected to" present alternatives to abortion. **J. Burtchaell** at 43. "Counselors are just to give the appearance of help... [T]hey think of themselves as company for the women.... The counselling was more of an assurance process."[36]

The influence of peers on the abortion decision of an adolescent can be substantial.[37]

(Footnote 35 continued from previous page) Olsen, supra at 190. "[F]amily planning is associated with higher, not lower, abortion rates." Id.

36 Id. at 42, citing **L. Franke, The Ambivalence of Abortion** 25,30 (1978).

37 See generally **E. Hurlock**, supra at 75- 77; **J. Gallagher**, et al., supra at 243; **I. Josselyn**, supra at 42, 43; Brittain, Adolescent Choices and Parent-Peer Cross-Pressures, 28 **Am. Soc. Rev.** 385 (1963).

Peers are not only the most frequent source of sex information to adolescents,[38] but they frequently are the source of misinformation about abortion.[39]

Research strongly suggests that adolescent decisions regarding abortion or child birth are significantly affected by the counsel they receive from others. They are particularly vulnerable. In one study, over one-third of those who, upon initial interview, agreed that they should not have an abortion subsequently had an abortion; in three-fourths of those cases the girls reported that they had been strongly influenced by someone who encouraged abortion.[40]

38 D. Ausubel, supra at 387,

39 Hanson, Abortion in Teenagers, 21 Clin. Obst. and Gynec. 1175, 1180 (1978).

40 Adler & Dolcini, supra at ___; Eisen, Zelman, Libolwitz, Chan & Evans, supra.

Thus, parental consultation provides the adults most interested in the ultimate well-being of pregnant adolescents the opportunity to protect them against false, misleading, prejudicial or harmful "advice" from their "friends".

III. The Illinois Parental Consultation Opportunity Law Substantially Advances The State's Significant Interest in Protecting Parental Rights.

A. The Illinois Law Protects and Supports Parental Childrearing Rights.

The parent-child relationship is ordinarily outside the reach of government regulation. The government can only interfere with parental control of their children in exceptional cases where it is necessary to protect the health or safety of the child or of society. Prince v.

Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972).

In Ginsberg v. New York, the Court noted:

> Constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, card, and nurture reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply or hinder.'. . . The legislature could properly conclude that parents and others . . . who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . .

390 U.S. at 639, 640 (emphasis added). Like the law upheld in Ginsberg, the Illinois parental consultation provision is a valid method of providing support to parents charged with the responsibility of raising children. It was within the providence of the Illinois legislature to protect families of pregnant teenagers from the interference of abortion

counselors who would dictate how all parents should raise their children.

The real moral dilemma of a pregnant adolescent presents a crisis for which only the most naive would say prior parental moralizing would be sufficient preparation. See Note, 52 So. Cal. L. Rev. at 1900. Thus, the opportunity for parental consultation before abortion is substantially related to preserving the rights of parents to raise their adolescent children.

B. The Illinois Law Sustains A Committment To Families.

Perhaps the most important impact of the Illinois law is that it represents official support for parental consultation and responsibility. In the complicated web of relationships that affects any particular minor's crisis pregnancy, the law will have suttle and far reaching

impact, not directly or immediately measurable, to encourage adolescent-parent communications, and resolution of the problems which cause teenage pregnancy, etc.

The Courts' decision in this case will convey a message that will profoundly affect our society. To strike down the Illinois law because, in isolation, a judge does not find compelling evidence of immediate and direct benefits, would be myopic. It also would send a loud and clear message to the institutions and individuals comprising the crisis pregnancy resolution network. That message would be detrimental to families, fundamental values, and the best interests of minors.

> Our main point is that the law does not merely regulate our lives, it articulates and symbolizes our values and mores. In an era when the family has been rendered increasingly vulnerable to dissolution, we should not gratuitously add to the stress by

> enshrining in law the starkly individualistic view that a child in the making, a future shared project of the family, is wholely and completely a 'private' matter for the woman to determine. . .

Etzioni, The Husband's Rights in Abortion, 12 Trial at 56, 58 (November 1976).

C. "Judicial Consent" And Other Alternatives To Parental Consultation Are Inadequate.

Alternatives to parental consultation do not offer workable solutions. In Belotti (II), a plurality strongly suggested that states should adopt "judicial bypass" procedures allowing "mature" minors to obtain judicial consent to abortion in secret, ex parte proceedings of which their parents had no knowledge and in which they could provide no input. In good faith, many states adopted such provisions. But they have proven to be spectacularly unworkable.

Professor Mnooken conducted extensive research regarding the Massachusetts "judicial bypass" laws. He discovered: "Every pregnant minor who has sought judicial authorization for an abortion [in Massachusetts] has secured an abortion." **R. Mnookin**, supra at 239 (emphasis in original). Of approximately 1300 pregnant minors who sought judicial authorization for abortion (in less than a two year period) judges found the minors to be "mature" enough to have concealed abortions in about 90% of the cases. When the judges concluded that a girl was not mature, they found that abortion would be in their best interests in all but five cases. In four of those five cases another judge authorized the abortion (in three cases on appeal).[41] In Hodgson v.

41 The sole minor out of 1300 who was not granted judicial permission for an abortion chose not to appeal, but went to a neighboring state and had the abortion. **R. Mnooken** at 239-

(Footnote 41 continued on next page

Minnesota, supra, similar results of the Minnesota judicial bypass system were described. More than 3,500 petitions were filed in a four and one-half year period beginning in 1981. Slip op. at 18. All but nine were granted. Two of the nine were denied because the minor did not want an abortion.

The judicial bypass scheme is very "unpopular with the [state] judiciary. Many judges see the process as a sham."[42] "[T]he process of judicial authorization has become a 'rubber stamp' operation." Id. at 242; Hodgson, Slip op. at 21. "A

(Footnote 41 continued from previous page)
40.

42 **R. Mnooken**, supra at 259. "[A]s a practical matter it is legally infeasible to deny an abortion to an immature minor--an appellate court which surely reverse any order that it was in the best interests of an 'immature' minor to have a baby." Id.

number of judges have disqualified themselves from these proceedings to avoid sanctioning what they see as an immoral act." **R. Mnookin**, supra at 259. "Others who do participate find the process extremely troubling because '[a] judge is asked to make an extremely important life decision without the simplest information.'" Id.

CONCLUSION

The Illinois Parental Notice Abortion Act strikes the final balance of competing interest that is possible in the context of a minor seeking an abortion. The Court can do much to dispell erroneous notions about abortion absolutism by reversing the lower courts' decisions invalidating the Act.

Respectfully submitted December 19, 1986.

Lynn D. Wardle, Counsel for Amici

Certificate of Service

I, Lynn D. Wardle, a member of the Bar of the Supreme Court of the United States and counsel of record for amici herein, do certify that all parties required by the Rules of the Supreme Court to be served have been served, and that on December 19, 1986, I deposited three copies of this brief in a United States post office or mail box, postage pre-paid, addressed to Roma Jones Stewart, Solicitor General of Illinois, 100 W. Randolph St., 12th Floor, Chicago, IL 60601 (counsel of record for appellants), and Colleen K. Connell, Roger Baldwin Foundation A.C.L.U., 220 S. State, Suite 816, Chicago, IL 60604 (counsel for appellees).

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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CASE NO. 85-673

In The Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, *et al.*,

Appellants,

v.

DAVID ZBARAZ, M.D., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF OHIO, ARIZONA, INDIANA, MINNESOTA, MISSOURI, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED FOR REVIEW

TO PROMOTE CONSULTATION BETWEEN AN UNEMANCIPATED PREGNANT MINOR AND HER PARENTS CONCERNING HER DECISION TO ABORT, MAY A STATE CONSTITUTIONALLY REQUIRE THAT THE ABORTION BE DELAYED FOR A SHORT PERIOD OF TIME AFTER THE PARENTS ARE NOTIFIED OF THEIR CHILD'S DECISION?

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INTEREST OF AMICI CURIAE

Ever since 1973, when this Court, in *Roe v. Wade,* 410 U.S. 113 (1973), recognized the privacy right of a pregnant woman to decide whether or not to bear her child, the states have struggled to enact legislation designed to promote parental involvement in the decision-making process concerning an unemancipated pregnant minor's abortion. In 1974, Missouri enacted legislation that, *inter alia,* required an unmarried pregnant minor to secure the written consent of one of her parents to obtain an abortion. This Court, however, declared that form of parental involvement unconstitutional because it exposed the minor's abortion decision to an absolute, and possibly arbitrary, veto by someone other than herself or her physician. *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 74-75 (1976).

Although the extent of parental involvement in *Danforth* was held to be unconstitutionally excessive, a majority of this Court recognized parental consultation as both a desirable and legitimate interest of the states. *See id.* 428 U.S. at 91 (Stewart, J., concurring); *id.* at 95 (White, J., dissenting); and *id.* at 103 (Stevens, J., concurring in part and dissenting in part).

This Court reaffirmed the importance of parental consultation in *Bellotti v. Baird,* 443 U.S. 622 (1979) (*Bellotti II*), even though it struck down Massachusetts' parental consent statute.

Two years later, this Court upheld a Utah statute that required the parents of an immature, unemancipated pregnant minor to be notified of her impending abortion. *H. L. v. Matheson,* 450 U.S. 398 (1981). In so doing, the Court declared "that parents have an important 'guiding role' to play in the upbringing of their children, . . . which presumptively includes counseling them on important decisions." *Id.* at 410 (citation omitted).

After *Matheson,* several states passed legislation requiring the parents of an unemancipated pregnant minor to be

notified in advance of their daughter's abortion. Of the twelve states that enacted parental notification statutes after *Matheson*, nine also required the abortion be delayed for a short waiting period, typically 24 hours.[1] The remaining three states required no waiting period.[2]

In addition, two states—Maine and Utah—enacted parental notification statutes prior to *Matheson*. Maine's statute did impose a 24-hour waiting period; Utah's imposed no waiting period. Me. Rev. Stat. Ann. tit. 22 § 1597 (1980); Utah Code Ann. § 76-7-304 (1978).

In 1983, this Court struck down a provision of an Akron, Ohio municipal ordinance that mandatorily, and without exception, imposed a 24-hour waiting period after the pregnant woman had given her consent. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 450-51 (1983). Since then, several of the notification statutes have been declared unconstitutional because they impose a waiting period. For example, Indiana's former parental notification statute, Ind. Code Ann. § 35-1-58.5-2.5(a)(West 1982), was struck down by the Seventh Circuit Court of Appeals in *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson*, 716 F. 2d 1127 (7th Cir. 1983). In that same year, the District Court of Nebraska declared Neb. Rev. Stat. § 28-347(1981) unconstitutional. *Orr v. Knowles*, No. CV 81-0-301, slip op. (D. Neb. Sept. 19, 1983).

Only in *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *appeal docketed, sub. nom. Akron Center for Reproductive Health v. Slaby*, No. 86-3664 (6th Cir. July 18, 1986), has a court upheld a waiting period in a parental notification statute. In *Rosen*, the district court observed that "the notification procedure . . . explicitly upheld for some minors in *Matheson* would be an empty formalism with no practical effect if the abortion could proceed before the parental consultation could take place." 633 F. Supp. at 1123. Given their recognized legitimate interest in promoting parental consultation, the *amici* have a substantial interest in ensuring that parental notification does not become an empty formalism.

[1] Arizona (Ariz. Rev. Stat. Ann. § 36-2152 (1984 Supp)); Idaho (Idaho Code § 18-609 (1985 Supp.)); Illinois (Ill. Rev. Stat., ch. 38, ¶ 81-61, *et. seq.* (1984 Supp.)); Indiana (Ind. Code Ann. § 35-1-58.5-2.5 (Burns 1982)); Minnesota (Minn. Stat. Ann. § 144.343 (West 1985 Supp.)); Nebraska (Neb. Rev. Stat. § 28-347 (1981 & 1984 Supp.)); Ohio (Ohio Rev. Code Ann. § 2919.12 (Anderson 1985 Supp.)); Tennessee (Tenn. Code Ann. § 39-4-202(f) (1982)); West Virginia (W. Va. Code § 16-2F-3 (1985)).

[2] Maryland (Md. Health-Gen. Code Ann. § 20-103 (1982); Montana (Mont. Code Ann. § 50-20-107 (1983)); Nevada (Nev. Rev. Stat. § 442.255 (1985)).

SUMMARY OF THE ARGUMENT

For more than a decade, this Court has recognized a legitimate state interest in promoting consultation between an unemancipated pregnant minor and her parents concerning her decision to terminate her pregnancy. In the case *sub judice*, while it professed to recognize that interest, the majority of the Seventh Circuit's panel effectively destroyed the interest by holding that no delay, however short in duration, may be constitutionally imposed upon the abortion procedure after parental notification occurs.

The panel's majority was misled by this Court's holding, in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), that a 24-hour mandatory waiting period applicable to an adult woman even after she has given consent to the abortion is unconstitutional. The ordinance in Akron furthered no legitimate state interest. Therefore, the waiting period was not rationally related to any legitimate state interest.

Parental consultation, on the other hand, is a legitimate state interest. A flexible 24-hour waiting period reasonably furthers that interest by allowing a short period of time in which an unemancipated pregnant minor can seek the help and advice of her parents in order to make her decision with understanding and after careful deliberation.

While furthering a legitimate state interest, Illinois' 24-hour waiting period does not unduly burden the minor's exercise of her decision-making right. It provides flexibility by exempting the physician from waiting 24 hours when the minor's life is in danger and, when her parents express their declination of notification. Further, although the delay may burden the minor with a second trip to the abortion clinic, or become longer than 24 hours because of scheduling conflicts, the burden is no greater than that which results whenever the bypass procedure under *Bellotti II* is implemented.

Assuming *arguendo* that a short delay does unduly burden the exercise by the minor of her abortion decision-making power, Illinois has a compelling interest that justifies the imposition of the burden. The notification requirement, with its flexible, but short waiting period, serves to balance the interests of the State and the minor. By serving as an offset to the potential intimidation of the minor in favor of an abortion which exists in abortion clinics, notification, with a flexible waiting period, tends not to encourage or facilitate abortions. Simultaneously, though, notification, with a flexible waiting period, tends not to discourage abortions because it does not, and cannot, expose the minor to an absolute third party veto of her decision.

Thus, Illinois' Parental Notice of Abortion Act of 1983 is constitutional, even without a judicial bypass procedure. Its inclusion of such a procedure only serves to enhance the due process that Illinois affords to unemancipated pregnant women contemplating an abortion.

ARGUMENT

A STATE'S INTEREST IN PROMOTING PARENTAL CONSULTATION CONCERNING AN UNEMANCIPATED PREGNANT MINOR'S DECISION TO ABORT JUSTIFIES THE IMPOSITION OF A SHORT DELAY OF THE ABORTION AFTER THE PARENTS ARE NOTIFIED OF THEIR DAUGHTER'S DECISION.

> *Consultation:* n. 1. a council or conference (as between two or more persons) usually to consider a specific matter, 2) the act of consulting or conferring: deliberation of two or more persons on some matter.

Webster's Third New International Dictionary 490 (unabr. ed. 1964).

Consultation, or more precisely, parental consultation underlies Illinois' Parental Notice of Abortion Act of 1983 (hereinafter the "Act"). *See,* Ill. Rev. Stat. ch. 38, ¶ 81-62. Parental consultation concerning an unemancipated pregnant minor's decision to abort gained initial recognition as a legitimate state interest in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976). Writing for himself and Justice Powell, the late Justice Stewart observed:

> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child." *Id.* at 91 (concurring opinion).

Justice White echoed those sentiments in his dissent. "Missouri," he wrote, "is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests, and it seeks to achieve this goal by requiring parental consultation and consent." *Id.* at 95

(dissenting opinion). *See also id.* at 103 (Stevens, J., concurring in part and dissenting in part).

Three years later, this Court reaffirmed the importance of parental consultation in *Bellotti v. Baird, id. 622 (1979) (Bellotti II)*. Declaring "that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained," 443 U.S. at 643 (footnote omitted), Justice Powell noted that the court administering the alternative procedure

> "may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby, or [it] may in such a case defer decision until there is parental consultation in which the court may participate." *Id.* at 648 (plurality opinion).

Danforth and *Bellotti II* each involved statutes requiring the unmarried pregnant minor to secure her parents' consent to her abortion. In *H.L. v. Matheson,* 450 U.S. 398 (1981), this Court confronted legislation that merely required parental notification. Not surprisingly, then, this Court declared "that parents have an important 'guiding role' to play in the upbringing of their children, . . . which presumptively includes counseling them on important decisions." *Id.* at 410 (citation omitted).

The legitimacy of the state interest was emphasized again in *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983):

> "In particular, we have emphasized that a State's interest in protecting immature minors and in promoting family integrity gives it a special interest in ensuring that the abortion decision is made with understanding and after careful deliberation . . ." *Id.* at 443 n. 32 (citations omitted).

Thus, as the Seventh Circuit noted in *Indiana Planned Parenthood Affiliates Association, Inc. v. Pearson,* 716 F. 2d 1127 (7th Cir. 1983), "The Supreme Court has foreclosed arguments that a state has shown an insufficient interest to support a consent or notification requirement." *Id.* at 1133.

In the case *sub judice,* the majority of the Seventh Circuit's panel professed to recognize the legitimacy of Illinois' interest in parental consultation. "The state," it wrote, "clearly has a significant interest in promoting parental consultation with a minor before her decision to have an abortion." *Zbaraz v. Hartigan,* 763 F. 2d 1532, 1536 (7th Cir. 1985). Yet, despite that recognition, the panel's majority struck down Section 4 of the Act, which established a 24-hour waiting period after the actual notice to both parents. In doing so, the panel declared that any period of delay, however short, "violates the plain command of *Pearson* that 'the state cannot require that an abortion be delayed once notification has been effected upon a minor's parents.' " *Id.* at 1538-39 (quoting *Pearson,* 716 F. 2d at 1143). Notification, the panel's majority stated, "itself promotes [the state's] interest." *Id.* at 1538.

To fully appreciate the *Zbaraz* majority's analysis, a review of *Pearson* is in order. The *Pearson* court, *inter alia,* declared unconstitutional an Indiana statute that required a pregnant minor's abortion to be delayed for 24 hours after actual notice, *i.e.* notice in person or by way of the telephone, was given to her parents. 716 F. 2d at 1142-43. The court rejected Indiana's contention that the waiting period was necessary to ensure that parental consultation occur because, it concluded, "the same objections to the waiting periods for adults listed in *City of Akron* apply to waiting periods for minors." *Id.* at 1143. The *Pearson* court then identified those objections as (1) the increased cost of obtaining abortions purportedly caused by requiring the minor to make two trips to the abortion clinic, (2) the arbitrariness and inflexibility of a waiting period which required even the minor whose parents had already expressly approved of her abortion to wait 24 hours to obtain it, and (3) the potential for conflicts between the minor's schedule and that of the

abortion clinic to produce a delay substantially longer than 24 hours. *Ibid.*

Although it borrowed from *Akron* the objections to a waiting period for a pregnant adult, the *Pearson* court did not also borrow the analysis employed by this Court. Contrary to the impression to be drawn from *Pearson*, this Court did not conclude that the waiting period placed a "severe burden" upon the pregnant woman's right to choose an abortion. It never reached the question of undue burden. Rather, this Court concluded that a waiting period which is imposed as a matter of course upon an adult pregnant woman who has already consented to the abortion fails to satisfy even the "rational basis" test. *Akron*, 462 U.S. at 450. Responding to Akron's contention that its 24-hour waiting period was beneficial to the pregnant woman because it provided her with an opportunity to reflect on the counseling she received, this Court stated:

> We find that Akron has failed to demonstrate that any legitimate state interest is furthered by an arbitrary and inflexible waiting period. There is no evidence suggesting that the abortion procedure will be performed more safely. Nor are we convinced that the State's legitimate concern that the woman's decision be informed is reasonably served by requiring a 24-hour delay as a matter of course.

Ibid.

Since a pregnant adult woman presumptively is competent to weigh the several and various consequences of her abortion decision, she does not require the consultation of persons other than her physician. *Id.; See also Danforth*, 428 U.S. at 71. An unemancipated pregnant minor, on the other hand, is presumptively incompetent to weigh those consequences. *Bellotti II*, 443 U.S. at 634; *Matheson*, 450 U.S. at 425 (Stevens, J., concurring in judgment). Consequently, "the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents." *Danforth*, 428 U.S. at 91 (Stewart, J., concurring).

By not evaluating the objections to the Akron ordinance in light of Indiana's legitimate interest in parental consultation, the *Pearson* court apparently concluded that this Court's acceptance of the district court's finding in *Akron* "that the mandatory 24-hour waiting period increases the cost of obtaining an abortion by requiring the woman to make two separate trips to the abortion facility," 462 U.S. at 450, ended the constitutional inquiry. But it did not; it merely began the inquiry.

> "The fact that a state statute may have some impact upon a minor's exercise of . . . her rights begins, rather than ends, the constitutional inquiry. Once the statute's impact is identified, it must be evaluated in light of the state's interests underlying the statute." *Matheson*, 450 U.S. at 421 (Stevens, J., concurring in judgment).

When the evaluation of the statute's impact leads to the conclusion that the statute does not unduly burden the minor's exercise of her rights, the constitutional inquiry ends—the statute is constitutional. *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting). However, when the evaluation leads to the opposite conclusion, the inquiry must continue because "[t]he 'undue burden' required in the abortion cases represents the required threshold inquiry that must be conducted before this Court can require a State to justify its legislative actions under the exacting 'compelling state interest' standard." *Id.* at 463; *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. ____, ____, 90 L. Ed. 2d 779, 836-37 (1986) (O'Connor, J. dissenting).[3]

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[3] The *amici* submit that the analytical framework enunciated by Justice O'Connor should be embraced by the entire Court because it facilitates resolution of all constitutional challenges to abortion statutes (and perhaps to all statutes regardless of their subjects), without resorting to the need to label interests and rights. Labeling, the *amici* further submit, does not advance but rather impedes the constitutional inquiry. And, no better illustration exists than in the decisions of this Court concerning

When Illinois' Parental Notice of Abortion Act of 1983 is viewed against this analytical framework, the Seventh Circuit's error in refusing to sustain any provision delaying the abortion after the minor's parents have been notified in person or via the telephone becomes apparent.

Implicit in the Seventh Circuit's declaration that " '[n]otification itself should lead to parental consultation,' " *Zbaraz*, 763 F. 2d at 1538 (quoting *Pearson*, 716 F. 2d at 1132), is the recognition that notification and consultation are not synonymous and, that notification is the first step in the process of consultation. The *Zbaraz* majority held, however, that only that first step can be statutorily mandated. Consequently, the court necessarily held that the second step of the process, which necessarily must be a period of time sufficient for the "unmarried pregnant minor to seek the help and advice of her parents," *Danforth*, 428 U.S. at 91, to assist her in making her decision "with understanding and after careful deliberation," *Akron*, 462 U.S. at 443 n. 32, is unconstitutional; *i.e.*, it unduly burdens the minor's exercise of her decision-making power. A review of this Court's prior cases and, indeed, of *Pearson* reveals that consultation does not unduly burden the exercise of decision-making power.

In *Bellotti II*, this Court said that during the judicial bypass procedure, the court could defer its decision until parental consultation occurred, "[b]ut this is the full extent to which

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Footnote 3 cont'd

abortion. In *Roe v. Wade*, 410 U.S. 113 (1973), this Court characterized the woman's right to choose an abortion as "fundamental." *Id.* at 152. A growing minority of this Court now resists that characterization. *See Akron*, 462 U.S. at 452 (O'Connor, J., dissenting), and *Thornburgh*, 90 L. Ed. 2d at 809 (White, J. dissenting). And, at least one distinguished commentator has questioned the utility of the "fundamental" label. See, Ely, *The Wages of Crying Wolf: A Comment On Roe v. Wade*, 82 Yale L. J. 920 (1973).

More importantly, even if the right to choose an abortion is "fundamental," that label is rendered meaningless when analyzing legislation affecting minors. In *Matheson*, Justice Stevens described the State's interest in the welfare of its young citizens as "fundamental and substantial." 450 U.S. at 421. If the minor's interest is "fundamental" and the State's countervailing interest is "fundamental and substantial," the inquiry does not move off square one.

Therefore, the *amici* embrace Justice O'Connor's analytical framework.

parental involvement may be required." 443 U.S. at 648. In *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, 462 U.S. 476 (1983), this Court uphheld a statute that potentially required the pregnant minor to wait more than 17 days before obtaining her abortion. [4] And, in *Pearson*, the Seventh Circuit itself upheld the provision of the Indiana statute that mandated a 48-hour delay following constructive notice. 716 F. 2d at 1143.

If it is constitutionally permissible for the bypass court to defer its decision to allow consultation to occur; if it is constitutionally permissible for a minor to endure a near three week delay to avoid consultation; and, if it is constitutionally appropriate to require the minor to wait 48 hours for the Postal Service to do its job, how can Illinois' statute, which requires but one 24-hour period of delay to facilitate consultation, be unconstitutional?

The panel majority said it was unconstitutional because it places the same direct and substantial burdens on the woman who seeks to obtain an abortion that the municipal ordinance did in *Akron*. 763 F. 2d at 1536. Those burdens, again, were: 1) the potential increase in the cost of the abortion caused by a second trip to the abortion clinic, 2) the aribtrariness and inflexibility of a requirement that compelled a pregnant minor

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[4] The statute under review in *Ashcroft* was Mo. Rev. Stat. § 188.028 (Vernon 1982). Subdivision 2(3) of that statute provided that "[a] hearing on the merits of the petition . . . shall be held as soon as possible within five days of the filing of the petition." *See* 462 U.S. at 480 n. 4. Mo. R. Civ. P. 44.01(a) governs the computation of time under § 188.028. It provided that "[w]hen the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Since Rule 44.01(a) also provided that "the day of the act . . . after which the designated period of time begins to run is not to be included," a three-day weekend could extend the time in which to hold a hearing under Mo. Rev. Stat. § 188.028.2(3) up to eight (8) days. Subdivision 2(6) of § 188.028 governed the appellate process. It provided for a notice of appeal to be filed within 24 hours of the trial court's judgment. It further provided that the appeal was to be docketed within five days of the filing of the notice. Again, since intervening Saturdays, Sundays and legal holidays are not included in the computation, nine (9) days more could be added to the bypass procedure. The total of seventeen (17) days could go higher because the statute did not specify when the judgment of either court must be entered, only that it be entered expeditiously.

whose parents had already approved of the abortion to wait the same period of time as the minor whose parents had objected, and 3) the potential for enlargment of the delay beyond 24 hours due to scheduling conflicts.

A second trip, albeit to the court, is inevitable when the bypass court defers its decision to facilitate consultation. Further, if the minor visited the abortion clinic before she sought judicial waiver of the parental consent requirement, a second trip to the abortion clinic would be a certainty. These trips, though, would not impose an undue burden. *Bellotti II,* 443 U.S. at 648.

Similarly, two, three or even four trips to court are foreseeable when the minor seeks judicial bypass and obtains it only upon appeal. Yet, under *Ashcroft,* such a set of circumstances would not contravene the Constitution.

Under Indiana's 48-hour constructive notice provision, a second trip to the abortion clinic would also be inevitable. That second trip would seem to cause the same increase in the cost of the abortion procedure, yet the potential for increased cost did not cause the *Pearson* court to strike down that aspect of Indiana's statute. *See* 716 F. 2d at 1143.

Furthermore, the potential for scheduling conflicts is no less under the circumstances just described than it is under a 24-hour waiting period.

Hence, if Illinois' statutory requirement of a mandatory 24 hour waiting period does impose an undue burden upon the minor's exercise of her decision-making power, it must be because it is arbitrary and inflexible. But, it is not. The Illinois Parental Notice of Abortion Act enumerates certain exceptions to the mandatory 24-hour waiting period. Section 6 exempts the physician from notifying the minor's parents when, in his best medical judgment, a medical emergency exists necessitating an immediate abortion. Ill. Rev. Stat. ch. 38, ¶ 81-66. Section 7 exempts the physician from notifying the parents when they accompany the minor to the abortion clinic

or, sign a notarized statement attesting to notification. Ill. Rev. Stat. ch. 38, ¶ 81-67(a). Section 7 further relieves the physician of the obligation to notify the minor's father when her mother accompanies the minor to the abortion clinic and tells the physician that the father of the minor is also the father of the fetus, or signs a notarized statement to that effect. Ill. Rev. Stat. ch. 38, ¶ 81-67(b).

On its face, therefore, the Act differs from both the Indiana statute and the Akron ordinance. Yet, the questions remain: 1) Are the exceptions rationally related to a legitimate state interest? and, 2) In light of that interest, do the exceptions unduly burden the minor's exercise of her abortion decision-making power? The *amici* submit that the exceptions *are* rationally related to a legitimate state interest and do *not* unduly burden the exercise of the minor's decision-making power.

The unemancipated minor is not married and has yet to be freed from the care, custody, and control of her parents. Most likely, she resides at home with her parents. Thus, it does not seem too burdensome to require her to bring both of her parents to the clinic to simply inform the physician that the consultation has occurred or, that they decline to consult with their child. *Cf. Bellotti II,* 443 U.S. at 643.

The same legitimate state interest underlies the alternative requirement of a signed, notarized statement. While a minor, and possibly her parents as well, may be annoyed by this requirement, it serves to guard against the possibility that a minor will avoid the unpleasantness of notifying her parents by forging their signatures or having a friend do so. Since mental or emotional distress or discomfort is not sufficient in itself to constitute an undue burden, *see Margaret S. v. Treen,* 597 F. Supp. 636, 652 (E.D. La. 1984), the requirement that the parents' signatures be notarized does not unduly burden the exercise of the minor's right to choose an abortion.

Therefore, the mandatory 24-hour waiting period of the Act is neither arbitrary nor inflexible.

Not being more burdensome than the judicial bypass procedure accepted as constitutional in *Bellotti II* and *Ashcroft,* and exposing the minor to no greater discomfort or annoyance than that tolerated in those cases and in *Margaret S.,* the Act does not unduly burden the minor's exercise of her abortion decision-making power, and is constitutional.

Assuming *arguendo,* however, that this Court concludes that Illinois' 24-hour waiting period requirement saddles the minor with an undue burden, it remains constitutional even without a bypass procedure because the State has a compelling interest that justifies the added burden.That compelling interest is the balance amongst the interests of the pregnant minor, her parents, and the State, that is derived from consultation, but cannot be achieved in its absence.

In *Danforth* and *Bellotti II,* this Court struck down statutes that vested third parties with an absolute right to decide whether pregnant women would or would not abort. If left unchecked, such consent legislation could have intimidated women into continuing pregnancies; something this Court has said is unacceptable. *See Thornburgh,* 90 L. Ed. 2d at 793.

In *Roe v. Wade,* on the other hand, the Court was quick to point out that the privacy right involved is neither absolute nor unqualified. 410 U.S. at 154.

This Court has further declared that "[t]he State may . . . [make] childbirth a more attractive alternative, thereby influencing the woman's decision." *Maher v. Roe,* 432 U.S. 464, 474 (1977). Concurring in that decision, Chief Justice Burger stated that *Roe v. Wade* and *Doe v. Bolton,* 410 U.S. 179 (1973) "do not suggest that the State is constitutionally required to assist [the woman] in procuring [an abortion]." 432 U.S. at 481.

Similarly, in *Matheson,* this Court stated, "The Constitution does not compel a state to fine-tune its statute so as to encourage or facilitate abortions." 450 U.S. at 412.

Since the states may not discourage abortions, *Thornburgh,* yet cannot be compelled to encourage or facilitate them, *Matheson,* it appears that, at a minimum, the states may enact legislation that strikes a balance. This is what a notification statute with a waiting period does, even without a bypass procedure.

While serving as a counterbalance to the potential for intimidation that exists under a pure consent requirement, a notification obligation, with a waiting period, offsets the potential intimidation that exists in abortion clinics. As a majority of this Court has recognized, a balanced view on the issue of abortion is rarely found within the four walls of the abortion clinic.

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. *It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.*

Danforth, 428 U.S. at 91 (Stewart, J., concurring) (emphasis added), quoted in *Matheson,* 450 U.S. at 409-10. And,

> [w]hile the medical judgment of a physician of course is to be respected, there is no reason to believe as a general proposition that even the most conscientious physician's interest in the overall welfare of a minor can be equated with that of most parents. *Moreover, abortion clinics, now readily available in most urban communities, may be operated on a commercial basis where abortions often may be obtained "on demand."*

Id. at 420 n. 8 (Powell, J., concurring) (emphasis added).

Common sense dictates that, if left unchecked by consultation, the scales would tip from the extreme of consent to the opposite extreme of demand. Common sense further dictates that, while the State tends to discourage abortions by enacting a consent statute, it tends to encourage or facilitate them by passing no legislation. Consequently, some type of legislation is necessary to balance the conflicting views and to maximize choice—the obstensible objectives of *Roe v. Wade*. *See Thornburgh*, 90 L. Ed. 2d at 820 (White, J., dissenting).

By balancing the extremes and maximizing choice, a notification statute with a waiting period, even one without a bypass procedure, furthers a compelling state interest. Accordingly, a pure notification statute, with a waiting period, is constitutional, and a bypass procedure is not constitutionally mandated. *Matheson*, 450 U.S. at 425 (Stevens, J., concurring in judgment).

Illinois' Parental Notice of Abortion Act of 1983 balances the extremes of consent and demand, while further establishing a judicial bypass procedure. Therefore, it is constitutional.

CONCLUSION

For the past decade and more, this Court has recognized the legitimacy and utility of the states' interest in parental consultation concerning a minor's abortion decision. "[T]he notification procedure which [this] Court explicitly upheld for some minors in *Matheson* would be an empty formalism with no practical effect if the abortion could proceed before the parental consultation could take place." *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1139 (N.D. Ohio 1986) (declining to follow *Zbaraz* and *Pearson* while upholding Ohio's 24-hour waiting period). Yet, the panel's majority opinion in the case *sub judice* does just that. By restricting Illinois' legislation to simple notification, which could be effected by a short telephone call placed to the

parents while their daughter is being prepped for surgery, the Seventh Circuit has precluded the State from enacting any legislation that would promote consultation.

The decision below, therefore, effectively destroys Illinois' recognized interest in parental consultation between an unemancipated pregnant minor and her parents concerning a grave decision having long term effects. If not reversed, that decision will expose unemancipated pregnant minors to the constitutionally tolerable distress of parental notification, but not to its benefits; a most incongruous result.

WHEREFORE, for all of these reasons, the amici respectfully support Appellants Hartigan and Daley in their request that the panel majority's judgment be reversed and Illinois' Parental Notice of Abortion Act of 1983 be declared constitutional.

Respectfully submitted,

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BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, *et al.*, *Appellants,*

—v.—

DAVID ZBARAZ, M.D., *et al.*, *Appellees.*

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL ABORTION RIGHTS ACTION LEAGUE; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICANS FOR DEMOCRATIC ACTION; CENTER FOR CONSTITUTIONAL RIGHTS; CENTER FOR POPULATION OPTIONS; COALITION OF LABOR UNION WOMEN; COMMITTEE TO DEFEND REPRODUCTIVE RIGHTS; EQUAL RIGHTS ADVOCATES; NATIONAL BLACK WOMEN'S HEALTH PROJECT; NATIONAL CAMPAIGN TO RESTORE ABORTION FUNDING; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC. OF THE UNITED STATES OF AMERICA; NATIONAL ORGANIZATION FOR WOMEN; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S POLITICAL CAUCUS; NORTHWEST WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; U.S. STUDENT ASSOCIATION; VOTERS FOR CHOICE; WOMEN'S EQUITY ACTION LEAGUE; WOMEN'S LAW PROJECT; AND WOMEN'S LEGAL DEFENSE FUND AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF AMICI*

Amici are 22 organizations nationwide that are deeply concerned with guaranteeing that all women have a full range of reproductive health options. The interests of each organization are more fully set forth in the Appendix.

SUMMARY OF ARGUMENT

Statutory restrictions on young women's access to abortion, like the Illinois Parental Notice of Abortion Act, Ill. Rev. Stat. ch. 38, ¶ 81-61 *et seq.* (1985),[1] at issue here, are but one example of attacks on women's right to reproductive choice that in recent years have taken many violent and hostile forms. In violation of young women's right to privacy and autonomy, these restrictions significantly burden the abortion decision, impose overwhelming hardship on young women already faced with an unwanted pregnancy and undermine their ability to function as equal members of our society.

The Illinois parental notice and waiting period statute will neither establish nor enhance communication between parents and their teenage daughters. The moving letters from young women across the country used throughout this brief well illustrate the diversity of young women seeking abortion and the variation of their life experience.[2] Their stories, told in their own words, demonstrate that young women cope with

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* Letters from counsel for the parties, consenting to the filing of this brief, are filed with the Clerk.

1 The text of the statute is set out in the Brief of Appellant Hartigan at App. 3-9.

2 In this brief, *amici* present excerpts from some of the thousands of letters received in response to the national campaign, "Abortion Rights: Silent No More." As part of this action, people wrote letters describing why they or women they knew chose to have abortions. Some of the letters have been published. *See* 131 Cong. Rec. H3586-3602, E2367, 2372 (daily ed. May 22, 1985); 131 Cong. Rec. S6892-93, E2411-12 (daily ed. May 23, 1985); Detroit Free Press, July 7, 1985 (Sunday Magazine), at 6-11; Southern Feminist Press, July-August 1985, at 8-9.

For the Court's convenience the letters from which excerpts have been taken are reproduced in a volume lodged with this brief. Letters which appear in this volume are designated as "L." The letters and excerpts have been quoted and reproduced as sent, without corrections in punctuation, grammar or spelling.

unwanted pregnancy in ways best suited to their own life circumstances.

In the majority of cases, young pregnant women consult at least one parent to discuss their life options and seek support. The younger the teenager, the more likely she is to seek parental involvement. But other teenagers, who may be the victims of family violence or sexual assault, or who have no ongoing parent-daughter relationship that would be likely to produce considered and supportive decisionmaking, choose not to inform their parents that they are pregnant and are seeking an abortion. In these instances, young women are exercising mature judgment, protecting themselves from violence or preserving delicate family relationships. Rather than supporting their efforts to make mature decisions, the state has chosen to discourage their abortion choice, placing young women in jeopardy of increased violence or abuse, or significantly endangering their lives or health.

Embedded in the state's effort to discourage abortion in ways that may force some young women to carry an unwanted pregnancy to term, is the traditional double standard of sexual behavior. Even though both young men and women are equally responsible for the sexual activity that has resulted in the pregnancy, the statute creates penalties for young women and only young women when it makes abortion difficult. Women, because of societal constraints, already bear the primary responsibility of rearing children. Multiple obstacles arise for women who bear children in their teen years: restricted educational opportunity, economic disadvantage, increased rates of divorce and poor health. Young women forced into childbearing by the statutory difficulties in obtaining an abortion must not only endure the negative economic and social impact of teenage motherhood that can be devastating to them and their children, but must do so against their will.

None of the three broad interests asserted by the state: promotion of family integrity, protection of minors from the consequences of their own immaturity and protection of the minor's health, justify the significant intrusions into privacy and autonomy that accompany compulsory notice and the mandatory waiting period at issue here. Consequently the judgment of the court of appeals must be affirmed.

ARGUMENT

Introduction

Since 1973, this Court has had occasion to review no fewer than 20 statutes that place burdensome restrictions on women's ability to decide whether to bear children. This Court has been extensively briefed on the medical aspects of the abortion procedure, the legal precedents involved, the technical interpretations and renderings of statutory language at issue in each of these cases. The Court has read thousands of pages of legal argument from *amici curiae* on both sides of this issue, representing hundreds of thousands of citizens who care deeply about the critical issues in this debate. Oral advocates, each year, have set forth the arguments and eloquently answered the Court's concerns. Members of this Court have conducted significant research about the implications of the abortion decision and the constitutional principles at stake.

But this Court has rarely heard the voices of women affected by these pernicious attempts to interfere in the most fundamental way with one of the most important of life's decisions—the decision to bear children. The stories of women, in particular the stories of young women that are set forth throughout this brief, bear witness to the courage and wisdom of women faced with unwanted pregnancies. The voices of young women can help us understand the fear and agony they suffer when faced with physical or sexual abuse within their family. Young women can explain how unwed motherhood, separation or divorce has affected their parents and their family relationships. Young women and not the state know best when it is appropriate to seek parental support and assistance. In fact, in the majority of cases, young women already involve at least one parent when faced with an unwanted pregnancy. Judged in this context, the context of young women's lives, not in the vague generalities of asserted state interests, this Court must find that the Illinois parental notification statute at issue here violates fundamental interests in privacy and autonomy guaranteed by our Constitution.

The significant intrusions into women's rights to privacy and autonomy must also be viewed in light of the fact that attacks on reproductive choice are not random isolated events in our

society but part of an often virulent and well focused campaign to undermine women's ability to control their sexuality and reproduction. Abortion opponents have used a variety of tactics that create a climate of fear and intimidation intended to discourage women from seeking abortion and discourage providers from performing them. In the last six years, over 747 serious incidents of violence, including actual, attempted and threatened bombings and arson, clinic invasions, assaults, vandalism, burglary, kidnapping and hostage-taking have been reported. Other opponents posing as abortion counselors or clinics have deceived women into believing they can help when their true purpose is to discourage the abortion choice.[3]

In the legislative arena, abortion opponents have sought on the state and national level to put into law their vehement opposition to abortion.[4] Indeed, the Illinois General Assembly has displayed unyielding hostility to a woman's right to reproductive choice. In 1975 it enacted an omnibus abortion statute, eleven provisions of which were declared unconstitutional, and since that time, it has reenacted essentially the same law in

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3 *See* National Abortion Federation, *Incidents of Reported Violence Against Abortion Providers* (mimeo 1977-1986) (available from the National Abortion Federation); Pregnancy Centers: Anti-Abortion Role Challenged, N.Y. Times (Jan. 23, 1987) at B-1, col. 3. *See also American College of Obstetricians and Gynecologists v. Thornburgh*, 613 F. Supp. 656, 659-63 (E.D. Pa. 1985) (recognizing increase in violent attacks against women seeking abortion and abortion providers).

4 Nationwide, such attacks include unsuccessful efforts to amend the Constitution, *see, e.g.*, Destro, *Abortion and the Constitution*, 63 Cal. L. Rev. 1250, 1290 (1975); pass a human life statute, S.158, 97th Cong., 1st Sess., 127 Cong. Rec. 128 (1981); omnibus statutes that seek to increase the cost of abortion services or increase liability on physicians who perform these services, *see, e.g., Thornburgh v. American College of Obstetricians and Gynecologists*, ___ U.S. ___, 106 S.Ct. 2169 (1986); minor and spousal notice and consent statutes, *see, e.g., Bellotti v. Baird*, 443 U.S. 622 (1979); restrictions on the speech of those who counsel or refer for abortion, *see Planned Parenthood of Central and Northern Arizona v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *aff'd sub nom. Babbitt v. Planned Parenthood*, 55 U.S.L.W. 3315 (U.S. Nov. 4, 1986); and restrictions on federal and state funding of abortion services, *see Harris v. McRae*, 448 U.S. 297 (1980); *but see Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982).

various amended forms, substantial portions of which have also been invalidated by the federal courts.[5]

This Court, understanding the coercive power of both individuals and the state that have been brought to bear on women who seek control over their own sexuality and reproduction, has correctly recognized:

> In the years since this Court's decision in *Roe*, States and municipalities have adopted a number of measures seemingly designed to prevent a woman, with the advice of her physician, from exercising her freedom of choice. *Akron* is but one example. But the constitutional principles that led this Court to its decisions in 1973 still provide the compelling reason for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy. '[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.' *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).

Thornburgh v. American College of Obstetricians and Gynecologists, 106 S.Ct. at 2178.

I. THE ILLINOIS PARENTAL NOTICE OF ABORTION ACT IMPOSES ADDITIONAL SIGNIFICANT HARDSHIP ON YOUNG WOMEN WHO ARE ALREADY FACED WITH THE BURDEN OF UNWANTED PREGNANCY.

The Illinois statute invalidated by the court of appeals requires a physician, prior to performing an abortion, to certify both that notice of their daughter's pregnancy and abortion decision has been given to *both* parents and that 24 hours has elapsed since notice was given.[6]

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5 *See Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978) (three judge court), *aff'd Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979); *Charles v. Carey*, No. 79 C 4541 (N.D. Ill. 1979); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980); *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983); *Charles v. Daley*, 749 F. 2d 452 (7th Cir. 1984); *Keith v. Daley*, No. 84 C 5602 (N.D. Ill. 1984); *Diamond v. Charles*, ___U.S. ___, 106 S.Ct. 1697 (1986), and this case.

6 As this case comes to this Court, there is no functioning judicial bypass procedure. Brief for Appellant Hartigan at 11 n. 9. *Amici* fully support

To a pregnant young woman, state legislation that requires "notice" to her parents of her abortion decision is indistinguishable from legislation mandating parental "consent" to her abortion decision. In general, teenagers are keen observers of family mores and dynamics. They are capable of making judgments about notifying their parents of their pregnancy and their abortion decision. Indeed, most young women do voluntarily inform at least one parent, with three-quarters of those under age 15 doing so. Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284, 291 (1980).[7] When young women choose not to inform a parent, they are usually acting on a well founded fear of adverse consequences. Overwhelmingly, the problems that teenagers perceive are not related to their parents' opposition to abortion, but to parents' attitudes about sex, as well as other complex family issues, such as violence or separation.[8]

A. Many Teenagers Live In Violent Or Abusive Family Situations That Would Be Made Worse By Compulsory Notice Of Their Abortion Decisions.

Family violence and sexual abuse are pervasive in our society. As many as one in five young women are the victims of sexual abuse by an adult. Contrary to the image of the child molester, a large number of offenders are friends and relatives of the young people they victimize. Almost 75 percent of

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appellees' position that the court of appeals properly remanded the question of the adequacy of the by-pass to the district court for decision once the appropriate rules are promulgated. *See Zbaraz v. Hartigan*, 763 F.2d 1532, 1544 (7th Cir. 1985).

7 Even among teenagers going to court as an alternative to notifying their parents, 20-25% discussed their abortion decision with at least one parent. *Hodgson v. State of Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), slip op. at 16.

8 Of course, teenagers who know their parents are strongly opposed to abortion will be especially sensitive to the consequences of mandatory notice. *See* Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 Am. J. Pub. Health 283, 284 (1982).

female victims know their abusers. Almost half the abusers are family members. D. Finkelhor, *Sexually Victimized Children* 144-45 (1979). Family violence, including severe physical assault and battering, is an equally prevalent problem. Recent studies estimate that over 2 million women and children are seriously beaten each year. When non-married intimate couples are counted, the incidence of family violence is even greater. M. Straus, S. Steinmetz & R. Gelles, *Behind Closed Doors: Violence in the American Family* 3-4, 12-19 (1980). Battering of women when they are pregnant is shockingly frequent. Over forty percent of women in shelters for battered women report this experience. W. Stacey & A. Shope, *The Family Secret: Domestic Violence in America* 31 (1983). Young women often find themselves pregnant and must decide what to do about the pregnancy when rape, incest or domestic violence are involved. Out of the shock and horror of the situation, they talk about their choices:

> I had just turned sixteen . . . My parents had just gotten back together after a lengthy separation, my mom was still on the verge of a nervous breakdown. My Dad didn't seem to care. Not about his wife, home, kids or anything to do with those subjects. . . . My brother picked me up from work at 7:30. From there he drove me to a deserted street, severely beat me and brutally raped me. I ran home screaming and crying, but when I told my parents what had happened, there was no compassion from my mother and my Dad refused to believe me. . . .
>
> [T]he next few weeks were nothing but pure misery. I lost every friend I had, except one. . . . I tried suicide twice with no success. Finally that one friend I had left in the world started trying to pull me out of my depression . . . . He helped me overcome my fear of men. Overcoming that fear soon resulted in my pregnancy. As soon as he found out, he left me. Instead of trying to ask him for any kind of help, I managed to save $300.00 myself and had my pregnancy terminated. Today I thank God for a very understanding and kind doctor. [L-1].

One woman describes the background to her illegal abortion:

> When I was fourteen years old my father's best friend caught me behind a bush and raped me—I was afraid to tell my family and finally told my friend who took me to an awful man who hurt me badly but I didn't have a baby—I could never have told my family for my father would have killed his friend and then beaten me . . . [L-2].

Section 7(b) of the Illinois statute creates additional problems. It permits waiver of paternal notice only when the minor's mother brings in a notarized statement of notification and informs the physician that the pregnancy is a result of father-daughter incest.[9] Under Illinois law, once a physician receives a report of child sexual abuse, he or she is obligated to report to the Department of Children and Family Services, which in turn can remove the young woman from her home or institute proceedings against the abuser. Ill. Rev. Stat. Ann. ch. 23, ¶¶ 2052-2055 (Smith-Hurd 1986). The daughter or the mother may of course independently wish to institute civil or criminal proceedings. The parental notice and waiting period statute, however, is stunningly cruel in its requirement that mother and daughter make that decision simultaneously with the difficult decisions about an unplanned pregnancy. As one young woman tells it:

> When I was 13 years old I was taken on a vacation trip with just my natural father and my self. During the course of this trip my father at one point drugged and raped me. At the time I thought it was a really horrible dream. Two or three months later I found myself, at the age of thirteen, very pregnant. Knowing very little about sex, and never having been sexually active my vivid memories of a dream strated becomming a very ugly reality. I don't need to go into all the horrible details that followed and the heartake brought to my mother in the days to follow . . . . [L-3].

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9 *Amici* concur with the district court's finding that the notarization requirement significantly compromises minors' and family confidentiality. *See Zbaraz v. Hartigan*, 584 F. Supp. 1452, 1461-62 (N.D. Ill. 1984), *aff'd* 763 F.2d 1532 (7th Cir. 1985).

Forced parental notice in these traumatic circumstances will not improve the quality of decision making, nor will it better protect the minor from further abuse. Perhaps its only consequence is to escalate the family crisis to a substantially higher level.

Nor does the exception in Sec. 7(b) do anything to help the teenager in the volatile circumstances of incest by the mother's boyfriend or by a close male relative.

> I am a 26 year old, single, Black woman. I have had 2 abortions: one when I was 12 years old, the other when I was 13. I got pregnant from my stepfather and my mother's boyfriend. My mother totally denied incest had been happening since I was 5.
>
> At the time, I felt having the abortions made my position safer by keeping it hidden. I was a child myself developing several emotional problems from living in an intolerable situation from which I knew of no escape. . . . [L-4].

A woman who helped a 15-year-old obtain an abortion writes that the young woman

> had been inseminated by an uncle who was an alcoholic . . . . That child of 15, now relieved of this unjust burden, thanked me with words but even better, with the look of relief in her young eyes. [L-5].

In some circumstances the natural father may be able to play a constructive role in responding to sexual abuse committed by another male relative. That role, however, should evolve from intra-family communication about the sexual abuse, not as a by-product of forced notice of an abortion.

Often, the consequences of parental notice coupled with a 24-hour waiting period will include intensified physical violence from an already abusive parent. A 24-year-old woman recalls her anxiety when she was pregnant at 17:

> At first, being a romantic, stupid 17 year old, I thought I'd keep the baby and take care of it myself . . . . Finally, it occurred to me what my hard-assed, alcoholic father would do to me if he found out I was pregnant. He

> would have beaten me to within an inch of my life. He'd beaten me silly for lesser things when I was younger; playing with Mom's makeup; typical kid stuff that other kids got yelled at for or sent to their rooms for, my sister and I were beaten with belts, sticks, 2 × 4's (no exaggeration), and were even punched and dragged around for . . . . [L-6].

In situations like these, the statute will not promote a positive framework that can enhance the quality of decision-making about the pregnancy and the abortion. More probably, the time will be occupied by brutal, destructive, and physically violent attacks. Forcing young women into such situations against their better judgment both denies their ability to cope with their own situation and undermines their ability to act responsibly, rather than supporting their efforts to make mature and effective decisions.

Compounding these difficulties, the actual period of delay caused by the notice requirement often will be more than the mandatory 24-hour waiting period, and could easily exceed a week. Many abortion clinics do not perform abortions daily, and the young woman must visit the abortion provider, obtain the information about the notice statute, decide what to do in response to the notice requirement, communicate with both parents or obtain acceptable evidence that communication with one parent is impossible, and return for the abortion. Other contingencies, such as one parent's absence, or a teenager's hesitancy about telling her parents, can extend the period of delay, subjecting young women to further abuse, endangering their lives and jeopardizing their health.

B. Teenagers Legitimately Decide Not to Involve Their Parents in the Abortion Decision in Order to Protect Delicate Family Relationships.

Perhaps the most difficult subject to discuss with one's parents is sex and sexuality. In a recent poll, over one-third of teenagers reported never having discussed sex with their parents. Half the teenagers who had discussed sex had not discussed birth control. L. Harris & Assoc., *American Teens Speak: Sex, Myths, TV and Birth Control* 34 (Planned Parenthood Poll, Dec. 16, 1986).

Many women share the experience of these writers:

> I had an abortion when I was 16 years old and living in a very small town. . . . Unfortunately I learned the most about contraceptives and how my own body works from the counselor at the abortion clinic when I was sixteen. I don't believe myself to be the only young girl to gain this essential knowledge this way. [L-7].

> In the summer of 1980, when I was seventeen years old, I had an abortion. Until I went for confirmation of my pregnancy at Planned Parenthood, I had never been educated about birth control or how to obtain it. I grew up in an affluent suburban town where sex and birth control supposedly did not exist. [L-8].

In some instances, parents' inability to communicate with their daughters leads them to enforce their moral positions in a manner that increases family tensions and can even interfere with the young woman's ability to prevent unwanted pregnancy. As this law student remembers:

> I was 15 when I got pregnant. It was two months after my mother died from a terminal illness. I had a regular boyfriend who was leaving for his first year in college. The night before his departure we went to make love and I could not find my diaphragm. My father had gone through my under ware drawer and taken away my birth control.
>
> I was angry that my father had not respected my privacy and was refusiong to allow me to act responsibly by protecting myself from pregnancy. [L-9].

Some young women have legitimate fears that their parents will become upset, angry or wholly irrational. One woman recalls:

> I remember my abortion too well and what could have happened had abortion not been legal for minors. I was 15 (actually 14 when I became pregnant) when I found out I was pregnant . . . . I was terrified of my father & my mother had told me in the past, that she would have to inform my father if anything like this ever happened. I

knew my father would throw me out & probably kill (literally) my boyfriend. . . So I was alone with no one but my boyfriend. He wanted to tell my mom & ask for her help but I refused because of my fear of my father . . . . [L-10].

Others choose to avoid discussing an unwanted pregnancy in order to protect whatever closeness they already enjoy in the family, to preserve parental approval, or to avoid creating family disappointments. By choosing abortion without involving their parents, minor women accomplish their dual goals of not bearing an unwanted child and maintaining harmony in the family. As one woman explained:

> I am a 23-year-old woman, recently married . . . I am very happy with myself and my life, and to see me no one would know that just six years ago I was an emotional wreck.
>
> I come from a lower middle-class family with four children. My eldest brother was always in some kind of trouble, drank heavily as a teen-ager, and 'had to get married' at the age of 18. My other brother was suspended from school and also drank as a teen-ager. My sister ran away from home five times between the ages of 12 and 17. I was different though. I was almost a straight 'A' student, involved in sports, the school paper, the annual staff, student council, and almost any other activity I could manage. I guess it was my way of escaping what was happening at home.
>
> When I was a senior in high school I began dating a great guy. We made big plans for our future. . . . During the summer between high school and college I missed a period, then two. I told myself that I wasn't pregnant—it couldn't happen to me . . . .
>
> The first thing that came to my mind was telling my parents. I couldn't imagine hurting them. I felt like I was their only hope, that they would be devastated if their image of me were shattered. . . . [L-11].

Other young women avoid telling one parent, usually an absent parent, because they have no regular contact nor on-

going relationship that would be likely to produce considered and supportive decision making. One of the most important demographic trends in the 1980's has been the growing diversity in the number and type of families. One half of American marriages end in divorce. L. Weitzman, *The Divorce Revolution* xvii (1985). A large number of married persons, while not formally divorced, live separately without regular contact among all family members. The number of out-of-wedlock births has increased significantly in recent years. *Risking the Future* 16, 76-77 (C. Hayes ed. 1987) (National Research Council publication). As a result, over 10 million, or one in five, children currently live with only one parent. Bureau of the Census, U.S. Dep't. of Commerce, Current Population Reports, Series P-20, No. 41, *Household and Family Characteristics* 1, 3 (1985). Ruling on a statute similar to the one at issue here, a district court recently found that

> The effect of compelling an adolescent to share information about her pregnancy with both parents in a divorced or separated situation can be harmful. The non-custodial parent will often reintegrate with the family in a disruptive manner. The adolescent may be perplexed as to why the non-custodial parent should become an important factor in her life at this point, especially when the parent previously has paid her little attention and offered little support. Moreover, the testimony revealed no instance in which beneficial relations between a minor and an absent parent were reestablished following required notification.

Hodgson v. Minnesota, slip op. at 28.

The Illinois statute accentuates these problems by failing to take account of the fact that divorced parents may have "joint custody" of their children, *see* Ill. Rev. Stat. Ann. ch. 40, ¶ 602.1 (Smith-Hurd 1986), thus making it difficult to know when the "custodial parent" exception to two-parent notice found in § 4(b) of the notice statute applies. Moreover, the determination of whether an absent parent "is not available . . . in a reasonable time or manner" is necessarily subjective. Both these provisions will create substantial pre-notification delay in many cases, as the young woman struggles to comply with vague, open-ended instructions about how to fit her

particular family situation into the Procrustean notice structure of the statute.

C. Teenagers Will Go To Great Lengths, Potentially Endangering Their Health, To Avoid Telling Their Parents About Their Abortion Decision.

Despite the statute's asserted purpose of helping minors to communicate with their parents, another result, the opposite of the statutory intention, will occur: young women will expend substantial time and effort avoiding the legal requirements entirely, by traveling to neighboring states that have less onerous restrictions. Indeed, teenagers will be encouraged by the statute to deceive their parents by concealing their activities or even leaving home, and to deceive their physicians by using false names, identifications, and personal histories.

A college student in Boston writes about her last year in high school:

> I was 17 years old, and very upset [when I had an abortion]. But I knew I was making the right decision. My mother never found out I was pregnant, the whole thing was done in a very secretive fashion. She never would have thought of me the same if she'd found out.
>
> I live in Massachusetts, and in order to receive an abortion here, I needed parental consent. (I wasn't yet 18.) Therefore I was forced to travel all the way to Hartford, Connecticut. I thank God there was *somewhere* I could go.[10] [L-12].

A woman from the Midwest writes about arranging for her abortion:

> I was single, 17 years old, when I became pregnant. . .
>
> I knew an abortion was my only choice. A family doctor suggested 'some place in Wichita,' but would not help me any more than that, fearing a conflict with my parents. I made arrangements to go to Wichita, have the

10 This letter reveals another aspect of these laws. Even though Massachusetts formally maintains a judicial by-pass option, Mass. Gen. Laws Ann. ch. 112, § 12S (West 1983), teenagers perceive only the need for parental involvement, not the complex and unfamiliar mechanism for avoiding it.

> abortion, and get back home, without family or friends finding out. Looking back, I can't believe I held up under such stress, although I do remember thinking alot about suicide at the time. [L-13].

Remembering the time prior to *Roe v. Wade*, a woman says:

> I am now 30 years old, divorced and the mother of a beautiful 5 year old boy. Although I am a single mother now, I am able to cope with it and was ready to have a child at the age of 25.
>
> When I was 16 however (in 1970) I certainly was not at all prepared for motherhood. I had just discovered sex, in fact I'm almost positive I became pregnant at the same time I lost my virginity.
>
> In 1970 abortion was illegal in all states except New York . . . . I was afraid, but I decided to get an abortion without my parents consent. My boyfriend and a group of my friends and I began a process that I am still amazed we ever followed through with, given none of us were older than 17 at the time . . . . I had obtained fake ID to prove I was 18 to avoid parental consent . . . .
>
> My friends and I raised the $350 in cash I needed. My boyfriend arranged for a ride for me to New York City. I wrote my parents a note telling them I was running away from home and left. . . .
>
> A very nice 17 year old boy who I hardly knew drove all night to get me to New York for my appointment the next day. . . . [L-14].

Although it is now possible for individual teenagers to escape the statute's strictures by traveling to another state, this underscores rather than alleviates the burden of the statute. Imposed on the young woman are the need for costly and time-consuming travel, the dangers of being a long distance away from the site where the abortion is performed, and the hazards of deception and risks of discovery. In seeking reversal of the court of appeals' ruling in this case, Illinois is asking the Court to approve for universal application the principles of this statute. If allowed to become general, and thus close off the perilous safety valve of travel to another state, these principles

are likely to lead to a significant increase in forced pregnancy and illegal abortion among teenagers.

II. THE STATUTE PERPETUATES DAMAGING STEREOTYPES AND FORCES SECOND CLASS CITIZENSHIP ON WOMEN.

Although this Court has often invalidated restrictions on abortion as violations of women's right to make important and fundamental decisions regarding childbearing, *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, ___ U.S. ___, 106 S.Ct. 2169 (1986), restrictions on abortion also violate the constitutional promise of equality. This Court stated most recently in *Thornburgh v. ACOG*, 106 S.Ct. at 2184-85:

> Our cases have long recognized that the Constitution embodies a promise that a certain sphere of individual liberty will be kept largely beyond the reach of government. . . . That promise extends to women as well as men. Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all. (citations omitted).

The Illinois Parental Notice of Abortion Act fails to keep that promise.

A. The Act Undermines Equality by Perpetuating the Traditional Double Standard, Penalizing Only Young Women Who Already Suffer The Harmful Consequences of Teenage Pregnancy.

The state characterizes a teenager's decision to obtain an abortion as one that requires extensive family involvement, even if the young woman does not want the particular kind of discussion the state mandates, although her decision to carry a pregnancy to term is untouched by the state. The state claims the power to intervene in the abortion "crisis" by forcing communication of the abortion decision to the young woman's parents. During the waiting period before the abortion can be performed, the teenager is at her parents' mercy, often with potentially serious and even violent consequences. *See* Sec. I.A., *supra*. For those young women who can neither notify their parents and endure the waiting period nor navigate the judicial by-pass procedure, the statute forces motherhood, clearly an intended element of the statute's effect.

But also embedded in the state's legislative pressure that young women carry their unwanted pregnancies to term is the pernicious traditional double standard of sexual behavior. Although each of the more than one million annual teenage pregnancies in the U.S. is caused by the actions of two people, "virtually all of the harmful and inescapable identifiable consequences of teenage pregnancy fall on the young female. . ." *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464, 473 (1981). The statute echoes the sentiments that one woman vividly remembers from the time she was 17:

> [T]he only things [my father] had ever said toward me concerning sex & birth control was when he sat my brother and I down looked at my brother and said, 'You do it, you know where the pharmacy is.' And then he looked at me and said, 'You do it & I'll kill ya.' Obviously he wasn't serious about what he said to me but it stayed in my mind and even the *thought* of telling him absolutely terrified me. [L-15].

See also Law, *Rethinking Sex and the Constitution*, 132 U.Pa. L. Rev. 955, 960-61 n.19 (1984) (reviewing legal sanctions).

In this view, pregnancy is the appropriate, if sometimes punitive, result of sex. And motherhood is the appropriate, if sometimes punitive, result of pregnancy. The statute's barriers to abortion seem designed to make motherhood the inevitable result of sex, simultaneously punishing young women's sexual activity and channeling them into the state's acceptable dependent maternal role, while leaving young men untouched by state intervention.[11]

As this Court has held, this is a view that cannot be enforced by the state:

> The argument is that minors' sexual activity may be deterred by increasing the hazards attendant on it. The same argument, however, would support a ban on abortions for minors, or indeed support a prohibition on abortions, or access to contraceptives, for the unmarried, whose sexual activity is also against the public policy of many States. Yet, in each of these areas, the Court has rejected the argument, noting in *Roe v. Wade* that 'no court or commentator has taken the argument seriously.' 410 U.S. at 148, 93 S.Ct. at 724.

Carey v. Population Services Intern., 431 U.S. 678, 694 (1977).

B. The Act Undermines Equality by Restricting Young Women's Educational and Job Opportunities Through Early Childbearing and Forcing Them Into a Life of Poverty.

By deterring abortion, the statute pushes on young women the often lifelong detriments associated with teenage childbear-

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11 The fact that young men do not become pregnant heightens the discrimination, rather than negating its existence, contrary to this Court's view in *Geduldig v. Aiello*, 417 U.S. 484 (1974). The analysis of pregnancy-related discrimination in that case has been consistenly criticized by commentators. Over two dozen law review articles have condemned both the Court's approach and result. For a complete list *see* Law, *Rethinking Sex and the Constitution*, 132 U.Pa. L. Rev. 955, 983 n. 107 (1984). As applied to Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125, 133-35 (1976), it has been repudiated by Congress with the passage of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). The analysis in *Geduldig v. Aiello* was inadequate when it was announced. The intervening years have provided ample demonstration that it should be rejected.

ing in our society: restricted educational opportunity, economic disadvantage, increased rates of divorce, and poor health. The negative effects of teenage childbearing accrue both to those teenagers who choose to carry to term and to those who carry to term because of burdensome state restrictions such as those at issue here. Young women who are forced to carry a pregnancy to term, however, not only must endure the multiple economic and social obstacles, but they must do so against their will.

Economic disadvantage and lack of social power are not, however, inevitable accompaniments of teenage motherhood. In a society based on gender equality, one that accepted women's personhood and equality by valuing their ability to be parents, to undertake meaningful work outside the home, and to have large aspirations for their lives, one that encouraged men similarly to combine workforce and nurturing roles, teenage childbearing (as well as later childbearing) would not so often be a confining loss of opportunities for women. Such a society would foster the conditions that make true reproductive choice possible.

Preservation of reproductive choice for teenagers, as for women of all ages, is essential to full and equal citizenship. It is particularly important in the light of the harsh social and economic realities facing young women today, which make state schemes to penalize and discourage abortion especially damaging. It is in this light that the Illinois statute must be examined and invalidated.

1. *Teenage childbearing restricts young women's educational opportunities and forces them into low status, low paying jobs or welfare dependency.*

Mothers who give birth before age 18 are far less likely to complete high school than those who postpone childbearing until after age 20. Recent studies show that these decreased educational opportunities are solely a result of young motherhood. *Risking the Future*, at 125-28; Card & Wise, *Teenage Mothers and Teenage Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 Fam. Plan. Persp. 199 (1978). One young woman who became

pregnant shortly before her sixteenth birthday remembers the threat of expulsion from school:

> There was no doubt in either of our minds that an abortion was the only choice for either of us. I couldn't keep the child, and as I was starting my junior year in high school in a private, church run school. . . I couldn't even have the baby. I would have been asked to leave the school-permanently-as soon as I began to show. [L-16].

Even more teen mothers will never finish college. Studies have found that women who become mothers as teens are 4-5 times less likely to finish college than those who delay childbearing. Card & Wise, *supra*, at 204. As one woman noted:

> I got pregnant at the age of 16 and had a child when I was 17 yrs old. I married the child's father, my first boyfriend, and was of course miserable. My husband wouldn't work and drifted further and further away from us. Since he didn't work I couldn't regularly buy birth control pills and I became pregnant again. I knew at that moment (18 yrs old) that I had messed-up my life so bad. If I had had another child my life would have been over. I mean over as for any kind of an education to support myself and my child. It wasn't an easy decision to make but you choose between your future and another child to take care of. Six months after the abortion we divorced, just as I thought we would. I received no child support so it was very hard. I can't imagine what it would have been like to double all of my child's bills and still educate myself. [L-17].

With small children to care for, little education and no other family breadwinner, many teen mothers are forced to take low wage, dead-end jobs or become dependent on public welfare. Card & Wise, *supra*, at 200-01. In fact, families headed by teen mothers are seven times more likely than other families to live in poverty. Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* 33 (1981). As one teenager who found herself pregnant and without parental support tells it:

> . . . Because of problems with my parents I moved from their home to my own apartment. . . Often I would go as long as 2 weeks without buying food because I had to pay rent. These things were hard enough to endure alone without the responsibility of a young child. [L-18]

2. *Teenage motherhood consigns young women to the worst elements of women's inferior economic status.*

Poverty is a central aspect of women's lives. Over thirteen million American women live in poverty, representing over 60 percent of poor adults. Indeed, women and their children comprise 76 percent of all persons living in poverty. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, *Characteristics of the Population Below the Poverty Level*, Series P-60, No. 147, Table II (1985). The high rate of poverty among women can be partly explained by the fact that women are denied equal opportunitiy in the paid labor market and that despite recent entry into non-traditional fields, they are primarily concentrated into low status, low wage, sex-segregated occupations.[12]

When women who are the primary caretakers of children become sole family breadwinners, poverty is a likely result. *Risking The Future, supra,* at 76, 81.[13] In 1984 the median income for single mother families was $11,769, compared to $32,459 for dual earner married couples. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-60, No. 49, *Money, Income and Poverty Status of Families and Persons in the United States* 7 (1984). More than half of the families maintained by Black and Hispanic women had incomes at $8,000 or below. *Id.* at 8.

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12 In 1955 the wage gap between men and women stood at 64 cents to the dollar. In 1983, women earned 63.5 cents for every dollar that men earned. Women's Equity Action League, *Agenda for Women's Economic Equity* 3-5 (1985).

13 Between 1970 and 1983, the proportion of children living in female-headed families doubled. Today one child in five lives in such a family; for Hispanic children it is one in four, for Black children it is one in two. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-20, No. 389, *Marital Status and Living Arrangements* 4 (1983).

Early marriage is not an effective solution to these problems, especially since women who give birth as teenagers have a higher rate of divorce than women who delay childbearing until age 20 or after. Alan Guttmacher Institute, *supra,* at 31. As one young woman who found herself pregnant at 17 wisely noted:

> I got pregnant when I was 17 years old and a senior in high school. My boyfriend was 18, in his first year in college. And 200 miles away. He was working his way through college in a pizza parlor. He was going to be a chemical engineer.
>
> To get married at that point of our lives would have been a disaster. So we decided I should have an abortion . . . It was the best decision for a terrible mistake. [L-19].

Divorced fathers often fail to support their children adequately, increasing the burden on divorced mothers. Two-thirds of divorced mothers with children receive either no child support or significantly less than that ordered by the court. Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports, Series P-23, No. 124, *Child Support and Alimony* (1983).

One woman notes:

> I am sole support of 3 children because my husband left three years ago with another woman. He does not pay child support and cannot be found to force him. I have a very hard time trying to do it myself. I just got a new job that pays better, but I still don't have benefits yet. If I have another baby I'll have to go back on welfare and I hate to do that because it does not set a good example for kids. [L-20].

The high cost and scarcity of quality child care make matters worse. Often women who need to work are forced to turn down full-time paid employment because they cannot find or afford child care near their homes or jobs. Winget, The Dilemma of Affordable Child Care, in *Day Care: Scientific and Social Policy Issues* 352-55 (E. Zigler & E. Gordon eds. 1982).

Women who give birth as teens not only have lower incomes but generally have to stretch that income to feed more children. A recent study found that women who first gave birth as teenagers had more children on average than those who waited to become parents until age 24, Card & Wise, *supra,* at 202-03; and more of these children are unwanted. Trussel & Menken, *Early Childbearing and Subsequent Fertility*, 10 Fam. Plan. Persp. 209, 214 (1978).

3. *Teen mothers and the children of teenage mothers also suffer from poor health.*

As a result of carrying a pregnancy to term, teenage mothers suffer from more health problems than young women who choose to terminate their pregnancies.[14] Although maternal complications and mortality have decreased considerably in recent years, especially as a result of legalized abortion and earlier prenatal care, they remain higher among teenage mothers. Alan Guttmacher Institute, *supra,* at 29; Bonham & Placek, *The Relationship of Maternal Health, Infant Death and Sociodemographic Factors to Fertility,* 93 Pub. Health Rep. 283 (1978).

The health of children born to teen mothers also suffers. Babies born to mothers between the ages of 15 and 19 are one and one-half times more likely to be premature or of low birth weight (less than 5.5 lbs.) than those of women who delay childbearing to ages 20-24. Children's Defense Fund, *The Health of America's Children* 14 (1987); Bonham & Placek, *supra,* at 283-92. One woman tells why abortion was the only appropriate choice in order to care for a low birth weight newborn:

> I had just had a baby boy who was born 2 months early and only weighed 2 1/2 pounds. My labor was very hard and I got pregnant 2 weeks after he was born. My boy wasn't even out of the hospital yet. I never would have been able to bring up another baby when mine was laying in the hospital still. [L-21].

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14 Overall, the risk of death from abortion is about one-seventh that of childbirth. LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?,* 248 J.Am.Med. Assoc. 188 (1982), *cited in* Grimes, *Second-Trimester Abortions in the United States,* 16 Fam. Plan. Persp. 260, 263 (1984).

III. BECAUSE THE ILLINOIS STATUTE INTRUDES UPON FUNDAMENTAL RIGHTS OF PRIVACY AND UNDERMINES WOMEN'S EQUALITY IT CANNOT SURVIVE CONSTITUTIONAL SCRUTINY.

This Court has repeatedly held that governmental action that burdens the exercise of the fundamental constitutional right to decide whether and under what circumstances to bear a child is subject to strict judicial scrutiny. *Roe v. Wade,* 410 U.S. 113, 155 (1973); *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 427-28 (1983); *Bellotti v. Baird,* 443 U.S. 622, 640-42 (1979). And as this Court has recognized, "Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority." *Planned Parenthood v. Danforth,* 428 U.S. 52, 74 (1976). Minor women as well as adult women possess these rights. Intrusion upon fundamental interests requires the state to demonstrate that the intrusion is narrowly tailored to further a compelling state interest.

Moreover, this Court has held that state regulation that undermines women's equality is subject to heightened judicial scrutiny. The regulation must be substantially related to important governmental interests. *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982); *Craig v. Boren,* 429 U.S. 190 (1976).

The state here has identified three broad interests that the statute purports to serve: promotion of family integrity; protection of minors from the consequences of their own immaturity; and protection of minors' health. Brief for Appellant Hartigan at 43. Compulsory notification of both a young woman's parents coupled with a twenty-four-hour waiting period does not further any of these asserted interests. Under either standard of review, the Illinois statute is invalid.

A. The Statute Fails to Promote Family Integrity.

The statute, through the imposition of a 24-hour waiting period after compulsory notice to both parents, purports to foster improved family communication and reasoned decision making. But as the letters set out above graphically illustrate, these methods cannot produce these results in a large number

of families. The twenty-four-hour wait is not enough time to foster genuine communication if it has been absent within the family, and may even be dangerous to the young woman in a violent or abusive household. Mandatory notice to two parents when one of them has not participated in the family cannot force the creation of an integrated family unit after the family members have failed to create one or have separated.

Moreover, by insisting on communication with both of the minor's parents as the only valid form of family communication, the statute denigrates the soundness of the advice of one parent or extended family members as well as their authority in their particular family structure. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family." *Moore v. City of East Cleveland,* 431 U.S. 494, 504 (1977). The waiting period in this context does not bear any relationship to improving family communication. It is, therefore, no different from the mandatory waiting period following informed consent that was found invalid by this Court in *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. at 450.

The state and its *amici* have misrepresented a long line of cases from this Court, *see Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Wisconsin v. Yoder,* 406 U.S. 205 (1972), to argue that constitutional rights to family integrity include the right to have the state facilitate parental interference with their children's fundamental rights. Yet in each of these cases, the state was seeking to intervene into an intact family unit by denying opportunities, such as the pursuit of particular educational goals or religious practices, to family members. The right vindicated by this Court is the right for family members to regulate their own affairs free of state interference. Here, by contrast, the state is using its coercive powers to require families to behave in particular ways, exactly the state role that this Court's privacy cases have rejected.

It is only because here the state is legislating in the politically and emotionally charged area of abortion that its intrusiveness on the rights of individuals and families may not be recognized for what it really is—the unconstitutional extension of state power. The idea that the state can mandate the timing and

manner of family decision making processes is generally repugnant. If the state tried to specify how parents and children communicated about such fundamental rights as interracial dating, *see Loving v. Commonwealth of Virginia,* 388 U.S.1 (1967), or contraception, *see Carey v. Population Services Intern.*, 431 U.S. 678 (1977), the courts would act to prevent the state from exercising its coercive powers. Nor would the Constitution permit the coercive power of the state to enforce parents' desire for their daughter to have an abortion, if she decided to carry the pregnancy to term. *See In re Smith,* 295 A.2d 238 (N.J. 1972). Similarly, state power cannot be utilized, through imposition of parental notice, to enforce parents' wishes when they work in practice to deny minors' fundamental rights to choose abortion.

B. The Statute Fails to Protect Immature Minor Women From Their Own Immaturity.

The 24-hour waiting period and two-parent notice provisions are substantially overbroad because only a small number of young women affected by them, if any, can arguably be considered immature.[15] Of the 13,752 women under the age of 20 seeking abortions in Illinois in 1982, only 382 were age 14 or younger, and most of that small number of younger teens would have consulted their parents. Illinois Abortion Statistics by Age Group 1977-1982. *See also* Torres, Forrest & Eisman, *supra.* Recent psychological studies have shown that minors are fully capable of making their own important life decisions. *See* Melton, Adolescent Abortion: A Psycholegal Analysis, in *Adolescent Abortion* 18-19 (G. Melton ed. 1986) (summarizing research literature). A college student remembers that:

> I was only seventeen when I became pregnant. This seems very young, so it would be easy to assume that I was irresponsible or noneducated. In reality my boyfriend and I were always very careful. We talked about sex, made an

15 When examined in the light of detailed evidence, statutes like the one at issue here appear to distinguish not mature minors from immature minors, but teenagers who go to court from those who can not or do not use the judicial by-pass process. *Hodgson v Minnesota,* slip op. at 24-25, 44.

> adult decison and took precautions at all times. Unfortunately, precautions don't work at all times . . . I thank God that parental permission was not necessary for me to have an abortion. [L-22].

Other studies suggest that adolescents who choose abortion are actually more mature than minors who carry their pregnancies to term. Melton, Adolescent Abortion, in Melton, *supra*, at 19.

Ironically, the method chosen by the state to "protect" immature minors from their own immaturity makes the decision making process so complex and difficult, or at least so confusing, that some teenagers wind up mired in the process, rather than helped to make mature decisions. Not only must the teenager make up her mind about whether to have an abortion, but she must also decide which of the harsh, inappropriate options she will pursue. If she decides to go to court, she must navigate the almost certainly unfamiliar and intimidating court process and risk loss of confidentiality and delay. *See Hodgson v. Minnesota,* slip op. at 14. If she decides to notify her parents, she must risk violence or abuse or risk exacerbating existing family difficulties, or at the very least suffer emotional turmoil during the mandated waiting period. Faced with two unsatisfactory options, some teenagers may well do nothing, the very counterproductive response which most closely mimics some young women's initial response to an unwanted pregnancy. Adler and Dolcini, Psychological Issues in Abortion for Adolescents, in Melton, *supra,* at 75-76. It is also the underlying intention of the statute's passage.

The final irony of the notice statute is that, by burdening the decision making process, the state has increased the likelihood that immature teenagers will bear unwanted children—thus legally becoming adults, expected to undertake and obligated to the rearing of those children.

C. The Statute Fails to Promote the Health of Minors.

Both the 24-hour waiting period and court by-pass engender delay in the performance of abortion. As this Court has recognized, the abortion procedure can be performed during only a very limited period of time. Indeed, even a modest delay can increase the complication rate by 15% to 30% and the

death rate by 50%. W. Hern, *Abortion Practice* 26 (1984). Delay is particularly acute for teenagers, who are more likely than adult women to seek medical attention at later weeks of gestation, when the safest and least expensive methods of abortion can no longer be utilized. *See* Grimes, *Second-Trimester Abortions in the United States,* 16 Fam. Plan. Persp. 260, 261-62 (1984).

Consequently, the statute, which causes additional delay of at least 24 hours and often much longer, will have a detrimental rather than positive impact on the health of minors. The state has utterly failed to demonstrate any positive health benefits of the restrictions at issue. Therefore, this asserted interest cannot be utilized to justify the significant intrusions on privacy and autonomy that are present here.

CONCLUSION

The decision to bear children, made in a supported and loving fashion, can perhaps be one of the most wonderful of life's gifts. But motherhood, forced upon young women, against their will, can endanger their lives and health, impose significant hardship, and relegate young women to a life of poverty. This decision, perhaps the most intimate and private that a woman will ever face, and one so critical to her ability to function as an equal member of society, must be left to her alone, with the help of her physician and others of her choosing. State interference in this decision, particularly where, as here, no compelling state interests justify the intrusions, violate the sphere of liberty and promise of equality guaranteed by our Constitution. Therefore, the judgment of the court of appeals must be affirmed.

Respectfully submitted*

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* Counsel acknowledge the valuable assistance of Joan L. Washington of the Center for Constitutional Rights in the preparation of this brief.

APPENDIX

The National Abortion Rights Action League (NARAL) is a national organization dedicated to keeping abortion legal, safe and accessible. NARAL has more than 200,000 members in 34 state affiliates and the national organization. NARAL spearheaded the May 1985 "Abortion Rights: Silent No More" letter collection and speak-out actions which gave voice to the millions of American women who have chosen to have abortions.

The American Association of University Women (AAUW), with its membership of 175,000 college-educated women, is strongly committed to achieving legal, social, educational, and economic equity for women. AAUW has a longstanding commitment to ensuring a woman's right to choose to have an abortion as an essential element to her reproductive freedom.

Americans for Democratic Action (ADA) is an independent liberal organization, founded in 1947, which has members in every state. ADA policy, which is set by its members, is that abortion is a personal and medical decision which should not be restricted by government action.

The Center for Constitutional Rights (CCR) is a non-profit litigation and educational organization. Founded in 1966 to provide legal support during the southern civil rights movement, CCR has been a national resource for civil rights and social justice. Securing access to full reproductive rights for all women has been a priority for CCR.

The Center for Population Options (CPO) works to enhance opportunities for young people in the decision-making areas of their lives: continuing their education, planning their families, obtaining needed help and social services, and attaining productive employment. CPO is dedicated to assuring teens access to accurate information and services concerning reproductive health choices, including abortion, as a fundamental right of every person of childbearing age.

The Coalition of Labor Union Women (CLUW) is a membership organization which represents the interests of the 7 million union women in the United States. CLUW supports the right of a woman to control her own destiny, both economic and social, and believes this right to be seriously impaired if the state intervenes in this most personal of choices.

The Committee to Defend Reproductive Rights (CDRR) is a San Francisco, community-based organization with 1,000 members throughout California and several others states. For ten years, CDRR has been dedicated to insuring women's reproductive freedom by engaging in public education issues concerning reproductive rights. CDRR supports and defends the reproductive right and freedom of all women, including young women.

Equal Rights Advocates, Inc. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society.

The National Black Women's Health Project is a health, education and advocacy organization which works to improve the quality of life for black women. Its work is based on the belief that black women, including poor black women, should have access to health services which reduce infant mortality and produce healthy babies as well as access to abortion services so that black women have a full range of reproductive choices.

The National Campaign to Restore Abortion Funding (NCRAF) is a newly developed national network reflecting the perspective of minority and working-class women. NCRAF seeks to guarantee abortion rights for all women through the restoration of Medicaid funding for abortion, which was cut by the Hyde Amendment in 1976.

The National Council of Jewish Women (NCJW) was founded in 1893, and represents 100,000 members in over 200 communities. NCJW is committed to social action and community service aimed at the protection of individual rights. Women's issues, particularly the protection of reproductive rights, continues to be a strong priority in all facets of NCJW's work.

The National Federation of Business and Professional Women's Clubs, Inc. (BPW/USA) is dedicated to promoting full participation, equity and economic self-sufficiency for working women. Founded in 1919, BPW/USA has a membership of 140,000 individuals and there are 3,500 local organizations. BPW members at the 1986 national convention adopted the following plank of the National Legislative Platform: "BPW/USA supports reproductive freedom as a right for all women."

The National Organization for Women (NOW) is a national membership organization of approximately 150,000 women and men in about 700 chapters throughout the country. It is a leading advocate of women's equality in all areas of life. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion.

The National Women's Health Network (NWHN) is a public interest organization whose membership, comprised of 10,000 individuals and 400 organizations representing 500,000 women, seeks to give women a voice in the health care system in the United States. NWHN supports women's rights to have complete control over their bodies, which must include the right to make decisions to use contraception, to bear children or to end a pregnancy.

The National Women's Political Caucus (NWPC) is a 77,000 member grassroots organization committed to equal rights and equal opportunity for all. The NWPC strongly supports reproductive freedom for all women regardless of age or economic status.

The Northwest Women's Law Center is non-profit Washington State organization concerned with securing equal rights for

women through the law. The Law Center supports ending unlawful discrimination on the basis of sex and ensuring that the law protects full reproductive rights for women.

The NOW Legal Defense and Education Fund (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1971 by leaders of the National Organization for Women.

The U.S. Student Association (USSA) is a student advocacy service, representing over 3 million students and over 400 universities and colleges around the United States. USSA is in favor of a woman's right to choose and of reproductive freedom because an unwanted pregnancy can restrict a woman's access to higher education.

Voters for Choice (VFC) is a national independent pro-choice political action committee, solely dedicated to keeping abortion safe, legal and accessible for all women. VFC's goal is to ensure the election of progressive, pro-choice candidates to Congress through provisions of financial and technical assistance.

The Women's Equity Action League (WEAL) is a national membership organization committed to the economic development and advancement of all women. WEAL supports reproductive freedom as a right for all women, and recognizes that right as intimately tied to the capacity of women to gain economic security.

The Women's Law Project is a non-profit, public interest law firm which seeks to advance the legal status of women through litigation, public education, and individual counseling. During the past fourteen years its activities both in Pennsylvania and nationally have included work in the fields of health, reproductive freedom, employment, domestic relations, housing, insurance, credit, education and constitutional privacy.

The Women's Legal Defense Fund (WLDF) is a tax-exempt not for profit membership organization founded in 1971 to challenge sex-based discrimination and to advance women's concerns through the legal system. WLDF has worked extensively on issues of reproductive freedom.

AMICUS CURIAE

BRIEF

No. 85-673

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,
Appellants,

v.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,
Appellees.

On Appeal from the Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF PEDIATRICS AND THE AMERICAN MEDICAL WOMEN'S ASSOCIATION IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Amici Curiae will address the following question:

Whether Section 4 of the Illinois Abortion Statute, which requires a physician, before performing a medically indicated abortion, to wait at least 24 hours after notifying both parents of a minor's decision to have an abortion, violates the minor's fundamental right of privacy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-673

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

v.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal from the Court of Appeals for the Seventh Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF PEDIATRICS AND THE AMERICAN MEDICAL WOMEN'S ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF *AMICI CURIAE*

Amici curiae are national organizations of health care professionals.[1] *Amicus* American College of Obstetricians and Gynecologists ("ACOG") is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

group of professionals providing health care to women; its 26,000 members represent approximately ninety percent of all obstetricians and gynecologists practicing in the United States. *Amicus* American Academy of Pediatrics ("AAP") is a nonprofit Pan-American Association of approximately 30,000 physicians certified in the specialized care of infants, children and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health. *Amicus* American Medical Women's Association, Inc. ("AMWA") is the national professional association solely representing women physicians and medical students. One of AMWA's primary missions is to encourage action on health issues particularly pertaining to women.

Amici's interest in this case stems from their desire to provide medical care of the highest quality, their dedication to good medical practice and their commitment to patients' freedom to seek and obtain needed medical care. To further these interests, physicians must be in a position to discharge their responsibility to provide care and treatment according to their best clinical judgment consistent with professional and ethical standards. *Amici*'s interest is not in debating the philosophical, ethical, moral or religious issues surrounding abortion. Indeed, their members hold widely divergent views on these issues, and *amici* take no position on these issues in this brief. *Amici*'s members do, however, share an interest in making certain that, when a patient seeks medical care and treatment, state laws do not unduly interfere with the physician's ability to exercise his or her best judgment in carrying out the patient's decision in the manner most suited to the patient's particular health needs.

The provisions of the Illinois statute at issue in this appeal interfere with the exercise of a minor's right to seek and obtain wanted medical care, prevent physicians from exercising their best medical judgment in providing high quality medical care and create serious obstacles to sound medical practice. The outcome of this case will directly affect the professional services *amici*'s members provide and the patients they serve. Accordingly, *amici* wish to present their views concerning the important issues raised in this appeal.

BACKGROUND STATEMENT

A. The Incidence And Risks Of Teenage Pregnancy Are Significant

There are nearly 10 million young women in the United States between the ages of 15 and 19. Of those, over 4 million are sexually active, and 1 million become pregnant every year.[2] In addition, 30,000 girls under the age of 15 become pregnant each year.[3] Indeed, it is estimated that 4 in 10 young women will become pregnant at least once in their teens.[4] Nearly 470,000 babies are born each year to women under the age of 20; one third of those births are to women under the age of 18.[5] The United States annual rate of 5 births per 1,000 girls under 15 is more than four times greater than that of any other developed country with similar levels of early sexual activity.[6]

Many teenage births occur out of wedlock and are unplanned. In 1984, there were more than 270,000 births to unwed women under the age of 20.[7] Further, it is estimated that 82 percent of those nonmarital pregnancies are unplanned.[8] The incidence of teenage pregnancy

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[2] National Academy of Sciences, *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. 1, C. Hayes, ed., 73 (1987) (referred to herein as *National Academy of Sciences*).

[3] *Id.* at 52.

[4] *Id.* at 51.

[5] *Id.*

[6] *Id.* at 16.

[7] *Id.* at 65.

[8] *Id.* at 52.

has increased since the early 1970s and that increase has been greatest among those under age 15.[9] Although the birth rate for teenagers has decreased somewhat over that time period,[10] the percentage of those births among unwed mothers has increased dramatically—currently half of all teenage births are to unwed mothers, compared with 15 percent in 1960.[11]

Pregnancy entails substantial risks to the teenage mother. Miscarriages and still births are more frequent among this group than among adult women.[12] Very young mothers—those under age 15—face the greatest risks, with higher rates of toxemia, anemia, prolonged labor, and premature labor.[13] In the United States, the risk of dying from complications related to childbirth is about seven times the risk of death due to an abortion.[14] Teenagers who do not terminate their pregnancies are at a significantly greater risk of dying in childbirth than are mothers in their twenties—the maternal mortality rate is as much as 200 percent higher among those 15 to

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[9] From 1972 to 1982, the pregnancy rate for 15 to 17 year olds increased 12 percent, from 64.1 per 1,000 women to 71.9 per 1,000. From 1973 to 1983, the rate for those under age 15 increased 20 percent, from 13.5 per 1,000 to 16.2 per 1,000. (Centers for Disease Control, Unpublished data released to the Alan Guttmacher Institute (1986)).

[10] *National Academy of Sciences*, at 53.

[11] *Id.* at 16, citing Bureau of the Census, *Marital Status and Living Arrangements: March 1983*, Current Population Reports, Series P-20, No. 389 (1983).

[12] Menken, "The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing," in C. Chilman, ed., *Adolescent Pregnancy and Childbearing: Findings from Research*, 169 (1980).

[13] *Id.* at 187. *See generally* Bonham & Placek, *The Relationship of Maternal Health, Infant Health, and Sociodemographic Factors to Fertility*, 93 Public Health Reports 283 (1978).

[14] LeBolt, Grimes & Cates, *Mortality from Abortion and Childbirth: Are the Populations Comparable?* 248 J.A.M.A., 188, 190 (1982).

19 years old and up to 1000 percent higher among those under 15.[15]

Other risks associated with teenage motherhood are serious. Half of all teenage mothers do not finish high school.[16] Teenage mothers are twice as likely to be on welfare as are mothers who first give birth between the ages of 20 and 24,[17] and teenage mothers are more likely to get divorced and to be unemployed than older mothers.[18] The younger a woman is during her first pregnancy, the more children she is likely to have, the closer together they are likely to be born, the greater the number of nonmarital births, and the higher the proportion of unintended births.[19]

Teenage births also pose risks to the child. The children of teenage mothers are twice as likely to die in

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[15] Sacker & Neuhoff, "Medical and Psychosocial Risk Factors in the Pregnant Adolescent," in I. Stuart & C. Wells, eds., *Pregnancy in Adolescence: Needs, Problems, and Management*, 107, 127 (1982).

[16] Card & Wise, *Teenage Mothers and Fathers: The Impact of Early Childbearing on the Parents' Personal and Professional Lives*, 10 Fam. Plan. Persp. 199, 204 (1978).

[17] Children's Defense Fund, *Welfare and Teen Pregnancy: What Do We Know? What Do We Do?*, 11 (1986) (34 percent of mothers under the age of 20 in 1976 lived in AFDC households as compared to 16 percent of young mothers who first had children in their twenties).

[18] A comprehensive study of adolescent marriage in Baltimore found that three-fifths of premaritally pregnant teens 17 years old or younger were separated or divorced within 6 years of marriage. F. Furstenberg, *Unplanned Parenthood: The Social Consequences of Teenage Childbearing* (1976). A follow up study found that those who had had children as teenagers were less likely to be married than their peers who delayed childbearing, and the early childbearers were much less likely to have remained in their first marriage. Furstenberg & Brooks-Gunn, "Teenage Childbearing: Causes, Consequences and Remedies," in L. Aiken & D. Mechanic, eds., *Applications of Social Science to Clinical Medicine and Health Policy*, 307, 317 (1985).

[19] Trussell & Menken, *Early Childbearing and Subsequent Fertility*, 10 Fam. Plan. Persp. 209 (1978); Moore & Hofferth, *The Consequences of Age at First Childbirth: Family Size*, Working Paper 1146-02, 18, Urban Institute (1978).

infancy as are children born to women in their twenties.[20] These children of teenagers are also more likely to be of low birth weight—2 times more likely when the mother is less than 15 years old and 1.5 times when the mother is 15 to 17 years old.[21] Low birth weight is associated with greater infant mortality and serious childhood diseases.[22]

Nearly 40 percent of pregnant teenagers (that is, nearly 440,000 annually) terminate their pregnancies by an induced abortion.[23] These teenagers typically wait until later in their pregnancies to obtain abortions than do older women: twice as many 15 to 19 year olds wait until the second trimester as compared to adult women.[24] There are several reasons why minors delay seeking abortions. Because their menses are often irregular, teenagers find it harder to detect a pregnancy. Minors have typically had very little experience with health care facilities and do not have ready access to a physician or clinic with whom they are familiar. Minors have difficulty arranging to pay for an abortion. Only 8 percent of those under 18 report that they are paying for the abortion themselves, with the rest receiving all or part of the funds from a third party, usually parents or a male partner. Delays in turn lead to a significant increase in the risk to the minor's health.[25]

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[20] Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away*, 29 (1981).

[21] *Id.*

[22] Children's Defense Fund, *The Health of America's Children: Maternal and Child Health Data Book*, 11 (1987). National Center for Health Statistics, *Trends in Teenage Childbearing: United States 1970-81*, Series 21, No. 41, 10 (1984).

[23] *National Academy of Sciences* at 58.

[24] Centers for Disease Control, *Abortion Surveillance 1981*, 37 (1985). The Centers for Disease Control found that 22.6 percent of those under age 15 and 14.7 percent of those age 15 to 19 had abortions after the 12th week, whereas for women 20 and older, the figure was 7.8 percent. *Id.*

[25] Cates, "Abortions for Teenagers," in J. Hodgson, ed., *Abortion and Sterlization: Medical and Social Aspects*, 140, 144 (1981). *See also* Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Persp. 284 (1980) (herein as Torres, Forrest, & Eisman). *See* pp. 13-16 *infra*.

B. Illinois Has Singled Out The Abortion Decision By A Minor And Burdened It With Special Laws

Illinois' regulation of a minor's abortion decision contrasts sharply with its regulation of all other medical decisions involving minors. Illinois generally requires that the physician secure the consent of only *one* parent before providing medical services to a minor. Ill. Rev. Stat. ch. 111, § 4502 (1986). Moreover, Illinois permits *pregnant* minors, whether emancipated or not, to consent to *any* medical or surgical procedure, other than an abortion, without parental consent, parental notification or a waiting period.

> "The consent to the performance of a medical or surgical procedure by a physician licensed to practice medicine and surgery executed by . . . a pregnant woman who is a minor, . . . is not voidable because of such minority, and, for such purpose, . . . *a pregnant woman who is a minor, . . . is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age.*"

Ill. Rev. Stat. ch. 111, § 4501 (1986) (emphasis supplied). Thus, Illinois has made a general policy decision that parental consent, or even consultation, is not required for minor, unemancipated pregnant teenagers who must decide, *inter alia*, whether to have amniocentesis, ultrasound, pre-natal surgery, a Cesarean section delivery, general anesthesia during delivery or induced labor. Many of these medical procedures performed during the course of pregnancy pose substantially greater health risks than abortion.[26]

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[26] For example, the risk of death while undergoing general anesthesia is between 10 and 20 per 100,000 (Rust, "New Monitors Are Seen As Reducing Incidence of Anethesiology Deaths," *American Medical News*, 2, 27 (Dec. 26, 1986)), as compared with 2.2 per 100,000 procedures for legal abortions. D. Grimes, *Abortion and*

In the statute at issue in this case, the State, in sharp contrast to Section 4501, would impose special and severe limitations on a pregnant minor's abortion decision. Section 4 of the statute requires that *both* parents receive *actual*, not constructive, notice of their daughter's intended abortion (Ill. Rev. Stat. ch. 38. ¶ 81-64 (1986)) and that, once notification is accomplished, the physician must wait a minimum of 24 hours before performing the abortion, regardless of parental approval or the stage of the pregnancy. A physician who does not follow these requirements will be exposed to criminal sanctions. Illinois has thus singled out the pregnant minor's abortion decision, as opposed to all other medical decisions by a pregnant minor, for restrictive treatment.

There is virtually no legislative history explaining or justifying the sharply different statutory treatment of a a pregnant minor's decision to abort. It does not appear that either house of the Illinois legislature held any hearings before imposing the restrictions on a minor's abortion decision. Nor was there any expert testimony presented to the legislature in support of the new statute. Furthermore, in the course of this litigation, the State did not submit any evidence establishing a factual basis for the legislative decision to place special burdens on the abortion decision of a pregnant minor. See J.S. App. 61-62 (no discussion by district court of State's evidence on cross motions for summary judgment). In sum, Illinois has made no attempt whatsoever to provide a factual basis for, or otherwise justify, these striking inconsistencies in its statutory scheme.

SUMMARY OF ARGUMENT

I.

In *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), this Court held that a mandatory 24-hour waiting period infringed the fundamental constitutional right of both minor and adult women to choose whether to terminate their pregnancies and thus triggered heightened judicial scrutiny of that requirement. Illinois' mandatory 24-hour waiting period similarly infringes minors' fundamental constitutional rights. In operation, it will often lead to delays much longer than one day. In so doing, the statute will increase in a constitutionally significant way both the health risks and the expense to a minor. The statute also interferes with the physician's exercise of his best medical judgment, and, by its vague notice and waiting requirements, will deter physicians from entering into a physician-patient relationship. Illinois must, therefore, meet a heightened standard of judicial review to justify infringement of the fundamental right. This case is thus different than *H.L.* v. *Matheson*, 450 U.S. 398 (1981), where, because of a barren record, this Court found that a particular minor's fundamental right was not burdened by a notice requirement without a waiting period and that the state did not have to meet a heightened standard of justification in the circumstances of that particular case.

II.

Under the appropriate standard of judicial review, Illinois' mandatory 24-hour waiting period is unconstitutional.

A. State restrictions on the privacy rights of minors are valid only if they serve a significant state interest that is not present in the case of an adult when evaluated in the context of the overall state statutory scheme. *Carey* v. *Population Services International*, 431 U.S. 678 (1977). In its brief (at 39-40), the State claims that its interest in promoting parental consultation through the mandatory waiting period is based on "the presumption that children are less capable of making important decisions and also upon the pivotal role of parents in rearing their children as they see fit. . . ." However, Illinois has itself abandoned that presumption with respect to pregnant minors and has by statute determined

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Health: Past, Present and Future 5 (1981) (paper prepared for the Health Care Commission, American College of Obstetricians and Gynecologists).

that pregnant minors may give valid legal consent to any medical procedure occurring during pregnancy without parental consent, parental notification or any waiting period. Having abandoned the presumption with respect to all other medical procedures involving a pregnant minor, the State does not have a significant interest in imposing requirements only on a decision protected by the Constitution. Thus, in the context of Illinois' particular statutory scheme, the only interest served by the 24-hour waiting period requirement is the invalid one of discouraging a minors' exercise of her fundamental right.

B. State restrictions on the privacy rights of minors must also be supported by more than a bare assertion, without supporting evidence, that the requirement is connected to the state's significant interest. Illinois' 24-hour waiting period has virtually no legislative history: there were no hearings, no committee deliberations, no presentations of expert testimony. During this litigation, appellants introduced no evidence. Thus, the State has no factual basis for asserting in the narrow circumstances of this particular statutory scheme that the 24-hour waiting period promotes parental consultation beyond the consultation effected by the notice requirement itself. Similarly, the State can show no factual basis for discriminating between the abortion decision (with a waiting period) and all other medical procedures during a minor's pregnancy (when the state imposes no consent, notification or waiting period requirements). And no factual basis exists. Carrying a child to term and undergoing certain medical procedures during pregnancy are much riskier and more costly than an abortion.

C. When a fundamental right is infringed, this Court has generally held that the State must carefully tailor its statute to its significant or compelling objectives. Although the Court has not clearly applied this test in the context of minors, it should do so in cases like this one where minors' constitutional rights are *significantly* infringed. Illinois' waiting period requirement is not carefully tailored. Even when a minor has the consent

of both parents, she is still improperly forced to wait 24 hours unless she complies with burdensome procedural requirements. Further, Section 7 (Ill. Rev. Stat. ch. 38 ¶ 81-67 (1986))—the exceptions provision of the statute—both fails to take into account certain recurring problems faced by physicians (*i.e.*, a single parent family with unmarried parents or an abusive parent who will endanger the health of the child) and is so vaguely worded that it will discourage physicians from providing medically indicated abortions when failure to conform to the law will result in criminal sanctions.

ARGUMENT

I. THE REQUIREMENT OF A 24-HOUR WAITING PERIOD IN THE ILLINOIS STATUTE INFRINGES A PREGNANT MINOR'S RIGHT TO CHOOSE WHETHER TO TERMINATE HER PREGNANCY

At the core of this case is the basic tension between the right of a minor woman to decide, in consultation with her physician, whether to have an abortion and the State's interest in insuring that this decision is made on an informed basis with the assistance and support of the minor's parents. Illinois has resolved this conflict by requiring, under penalty of criminal sanction, that the physician must give actual notice to *both* parents that their minor daughter intends to have an abortion *and* that the physician must wait at least 24 hours after such notice before performing the abortion.[27] For purposes of determining whether there has been an infringement of the fundamental privacy right which triggers a more stringent standard of judicial review, this statute is different than the mere notice to parents required by a Utah statute which this Court upheld on a strikingly sparse record in *H.L.* v. *Matheson*, 450 U.S. 398 (1981), and is much more like the parental veto provision required by a Missouri statute, which this

[27] The existence of a judicial alternative to notice to the parents is not relevant to the question of Section 4's constitutionality. *See* pp. 29-30, *infra*.

Court struck down in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976).

Given the record presented, the Court in *Matheson* held that mere notice to parents in that case did not impose any burden on the minor's freedom to choose an abortion when she wants one. The appellant in that case presented no evidence concerning any burden the notice requirement might have imposed upon her. She merely insisted that she had an absolute right not to have to notify her family.[28] Thus, because no substantial burden on the minor's rights was shown on the record presented, the statute did not have to satisfy a more stringent constitutional test.

The combined notice and 24-hour waiting requirements in this case, by contrast, clearly burden in a substantial way the pregnant minor's fundamental privacy right. This Court has directly held that a 24-hour waiting period imposes a constitutionally significant obstacle to a woman's exercise of her right to choose to terminate her pregnancy. *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 449-51 (1983), That holding applies equally here because the burdens imposed by Illinois' 24-hour waiting period are not in any significant way different from the burdens which triggered heightened judicial review in *City of Akron*.

[28] By analyzing *Matheson* in this way, *amici* do not mean to suggest that all parental notification statutes do not burden the fundamental right and thus can properly be analyzed under a rational relationship test. The Court in *Matheson* clearly did not decide the question whether a state law that requires parental notification "unconstitutionally burdens the right of a . . . minor whose best interests would not be served by parental notification." 450 U.S. at 414 (Powell, J,. concurring). It is quite plausible, if not likely, that a litigant could show that a two-parent notice requirement, such as the one in Illinois, does in fact burden the right in a way that would require the State to demonstrate that its statute served significant interests. *See Hodgson* v. *Minnesota*, 648 F. Supp. 756, 764 (D. Minn. 1986). In the present case, the notice requirement was upheld by the court of appeals and that holding was not cross-appealed.

Health Risks. One of the most serious burdens imposed by Section 4 is the increased medical risk resulting from the delay inherent in the actual operation of a mandatory waiting period. The statute requires the physician or his agent to notify both parents directly, by speaking to them in person or on the telephone, which in many cases may require several days or more.[29] Once notification is accomplished, the physician must wait at least an additional 24 hours before performing an abortion on the minor.

As a practical matter, this will result in the minor having to make a second trip to the health care facility with additional delays resulting from scheduling. A physician will not call a minor's parents and tell them that he is going to perform an abortion on their daughter before he has even examined the minor or discussed with her the various factors implicated in a decision to abort.[30] The court of appeals thus correctly found that the Illinois waiting period requirement does lead to a second trip to the physician, and that such a second trip is identical to

[29] The difficulty of effecting notification, and the resulting delay, will be even greater for a minor whose parents are estranged, or in cases where one parent is absent although not divorced. The exceptions in Section 7 do not provide any relief from the notification reqiurements in such circumstances. *See* pp. 26-28, *infra*.

[30] Appellants assert that the waiting period does not compel the minor to visit her physician twice because she can call ahead, have her physician give notice to her parents and then come in for the abortion 24 hours later. Br. for Appellant 51-52. This may be theoretically possible, but appellants did not present any evidence on this issue. Even if it were shown that most minors called physicians in advance to set up an appointment, it would be totally contrary to accepted medical practice for a physician to call the minor's parents to tell them that he is going to perform an abortion on their daughter in 24 hours, although he has never met the minor, examined her, or even confirmed her pregnancy. *See, e.g.*, American Academy of Pediatrics, Committee on Adolescence, *Pregnancy and Abortion Counseling*, 63 Pediatrics 920 (1979) ("information [about the existence of a pregnancy] should always be given in a personal and private office setting, never by telephone").

the one found to require heightened State justification in *City of Akron*, 462 U.S. at 450.

Moreover, depending on where she lives, a minor may have to travel some distance to find a facility that will perform an abortion. In such cases, the rigid requirement of a 24-hour waiting period will, in fact, lead to much longer delays. For example, there is only one provider of abortion services in all of northwest Illinois, an area of several hundred square miles extending west to Iowa, east to Chicago, north to Wisconsin and south to Peoria. *Ragsdale* v. *Turnock*, 625 F. Supp. 1212, 1217 (N.D. Ill. 1985). Many clinics and physicians perform abortions only on certain days of the week and a 24-hour waiting period will, in practice, result in at least a week's delay. The delay is likely to be greatest in clinics that serve predominantly rural areas which must rely on out-of-town physicians to perform abortions. The delay will be further complicated and exacerbated by the minor's own scheduling problems in arranging to return to the clinic, thereby missing more time from school, home or after-school work. The realities of clinic, physician and patient schedules ensures that the waiting period will often be much greater than 24 hours.[31]

The delay caused by the practical operation of the 24-hour waiting period leads to a medically significant increase in risk for many minors. Although an abortion is a relatively low risk medical procedure for the pregnant woman,[32] health risks increase dramatically with the gestational age at the time of the abortion. The number of maternal deaths per 100,000 abortions is .5 if performed within 8 weeks of conception, 1.3 for weeks 9-10,

[31] *See, e.g., Women's Medical Center of Providence, Inc.* v. *Roberts*, 530 F. Supp. 1136, 1146 (D.R.I. 1982) ("the record in this litigation shows that the mandatory wait may combine with other scheduling factors such as doctor availability, work commitments, or sick leave availability, to increase the actual waiting period to a week or more"); *Women's Community Health Center, Inc.* v. *Cohen*, 477 F. Supp. 542, 550 (D.Me. 1979).

[32] *See* pp. 25-26, *infra*.

2.1 for weeks 11-12, 4.8 for weeks 13-15, 12.8 for weeks 16-20, and 15.3 for abortions performed after the 21st week.[33] Mortality due to abortion, although quite low in comparison with other medical procedures, increases about 50 percent for each week after the 8th week.[34]

Because minors delay seeking an abortion longer than adults (see p. 6 *supra*), any additional delay for them will pose a greater health risk in having an abortion than a similar delay would cause an adult. Thus, lower courts have recognized that the delay resulting from a mandatory waiting period leads to constitutionally significant medical risks for pregnant minors. See, *e.g.*, *Women's Medical Center of Providence, Inc.* v. *Roberts*, 530 F. Supp. at 1146, *Hodgson* v. *Minnesota*, 648 F. Supp. at 765. The additional delay caused by the operation of a mandatory two-parent notification and waiting period requirement will push some minors into the second trimester before they receive an abortion.[35] In that event, the risk of medical complications increases dramatically.[36] The mandatory waiting period by itself also creates additional anxiety and stress, which in turn adds to the medi-

[33] American College of Obstetricians and Gynecologists, *Precis III: An Update in Obstetrics and Gynecology*, 213 (1986) (based on data from the Centers for Disease Control: *Abortion Surveillance 1979-80* (1983)). *See also* Cates, Schulz, Grimes & Tyler, *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plan. Persp. 266, 267-268 (1977).

[34] Cates & Grimes, "Morbidity and Mortality of Abortion in the United States," in J. Hodgson, ed., *Abortion and Sterilization: Medical and Social Aspects*, 155, 171 (1981).

[35] This possibility is more than hypothetical. Preliminary reports from Minnesota show that over 25 percent of Minnesota minors now get second trimester abortions, an increase of 26.6 percent since the imposition of the Minnesota two-parent notification statute. Finding No. 124, *Plaintiffs' Proposed Findings of Fact, Hodgson* v. *Minnesota*, Civ. No. 3-81-538 (May 16, 1986). This is in contrast to the national pattern of women obtaining abortions at an earlier period of gestation. C. Tietze & S. Henshaw, *Induced Abortion: A World Review 1986*, 80 (6th ed. 1986).

[36] *Id.* at 106.

cal risk of abortion.[37] In sum, the delay caused by the 24-hour waiting period—which in practice will often be much longer than one day—significantly increases the risk to a minor's health and thus infringes her constitutional privacy right. *Harris v. McRae*, 448 U.S. 297, 328 (1980) (White, J., concurring); *City of Akron*, 462 U.S. at 450.

Costs and Access. The mandatory 24-hour waiting period requirement also increases the cost to a minor seeking an abortion. As noted, by requiring a 24-hour waiting period, the statute effectively requires minors to make two trips to the physician's office or clinic, resulting in additional travel costs.[38] This Court has recognized that such a second trip imposes a substantial burden on a woman's exercise of her constitutional right to seek an abortion. *City of Akron*, 462 U.S. at 450. If the delay pushes the minor's pregnancy into the second trimester, the cost of the abortion itself increases substantially.[39]

The difficulty of obtaining an abortion is also greatly increased if delay forces a minor into the second trimester. Surveys of clinics reveal that 82 percent do not perform abortions after the first trimester.[40] The search for a clinic, hospital or private physician to perform a second trimester abortion increases the costs, delay and

[37] Lupfer & Sibler, *How Patients View Mandatory Waiting Periods for Abortion*, 13 Fam. Plan. Persp. 75, 78 (1981) (25 percent of the women studied in Memphis area suffered additional mental anguish because of a 48-hour waiting period; cited in *Leigh* v. *Olson*, 497 F. Supp. 1340, 1347 n.8 (D.N.D. 1980)).

[38] Studies indicate that teenagers travel an average of 45 miles away from their homes to obtain abortion services. Torres, Forrest, & Eisman at 289.

[39] In 1982, the average fee charged for a first trimester abortion performed in a clinic was $190. In comparison, a second trimester (16th week) abortion performed in a clinic cost on average $358, with the same procedure costing $740 if performed in a hospital. Henshaw, *Freestanding Abortion Clinics: Services, Structure, Fees.* 14 Fam. Plan. Persp. 248, 255 (1982).

[40] *National Academy of Sciences* at 191.

risk to the pregnant minor. For minors who begin the process of seeking an abortion quite late, there is a real possibility that the additional delay inherent in the notification and waiting period requirements will prevent them from being able to obtain an abortion. This Court has found such an unnecessary increase in the cost of or decrease in access to an abortion constitutes a burden on the privacy right. *City of Akron*, 462 U.S. at 438-39.

Interference With The Physician's Medical Judgment And The Physician-Patient Relationship. This Court has recognized that a physician's ethical obligations require him to recommend that a woman delay effectuating her decision to abort if in his medical judgment a delay will be beneficial to his patient. *City of Akron*, 462 U.S. at 450.[41] However, Illinois' arbitrary and mandatory waiting period prevents a physician from exercising his best medical judgment in cases where a delay is contrary to accepted medical practice. Thus, if a minor has the consent of both parents and is accompanied to a clinic by one parent who would swear that the other consents to the procedure, the physician nevertheless could do nothing even if an abortion at that time was medically indicated because the minor's pregnancy was very late in the first trimester and the physician would not be available for another week. Such a restriction of a physician's judgment is contrary to this Court's ruling that "[t]he decision whether to proceed with an abortion is one as to which it is important to 'affor[d] the physician adequate discretion in the exercise of his medical judgment.'" *Id.*, quoting *Colautti* v. *Franklin*, 439 U.S. 379, 387 (1979).

As *amici* discuss in more detail later (pp. 28-29, *infra*), the ambiguity in the two-parent notice provision itself, which makes it difficult for the physician to know precisely when the 24-hour waiting period begins to run, sig-

[41] The Court in *City of Akron* looked to *amicus* ACOG's recommendation that clinics exercise discretion in allowing the patient "sufficient time for reflection prior to making an informed decision." ACOG Standards 54, cited in *City of Akron*, 462 U.S. at 450 n.43.

nificantly interferes with the physician's ability to maintain a physician-patient relationship. This Court has held that this type of interference with the physician-patient relationship infringes the individual's privacy right. *City of Akron*, 462 U.S. at 427; *Roe* v. *Wade*, 410 U.S. 113, 166 (1973). Most physicians, confronted with the prospect of a criminal prosecution for providing an abortion when the consent of only *one* parent can be readily obtained, will reasonably decline to perform the procedure. What makes this decision doubly difficult for physicians is their knowledge that each week the abortion is postponed, the health risks to the minor female increase substantially. Nevertheless, the physician is forbidden to exercise his medical judgment and perform the abortion, even if the physician concludes that the abortion procedure is in the patient's best interest. Instead, he must wait until 24 hours after a reasonable effort has been made to contact a missing parent, whose role in the decision process, by all accounts, may be more harmful than helpful.

II. UNDER THE APPROPRIATE STANDARD OF REVIEW THE STATE CANNOT JUSTIFY ITS INFRINGEMENT OF THE FUNDAMENTAL PRIVACY RIGHT CAUSED BY THE 24-HOUR WAITING PERIOD REQUIREMENT

Because the 24-hour waiting period infringes the pregnant minor's fundamental right to decide whether to terminate her pregnancy, the Court must analyze the constitutionality of the waiting period under standards more exacting than those employed in *H.L.* v. *Matheson*, *supra*. When, as here, the state law substantially infringes a fundamental right, then the law is "presumptively unconstitutional" and the burden rests on the State to justify the burden it imposes. *Harris* v. *McRae*, 448 U.S. at 312, quoting *City of Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980).

The precise formula for reviewing the constitutionality of statutes which substantially burden a pregnant minor's abortion right has never been clearly articulated

by this Court, but two tests at a minimum clearly apply. First, "State restrictions inhibiting privacy rights of minors are valid only if they serve a "significant state interest . . . that is not present in the case of an adult." *Carey* v. *Population Services International*, 431 U.S. 678, 693 (1977), (plurality opinion), quoting *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 75 (1976). Second, the State's "attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, . . . [without] supporting evidence, that the burden is connected to such a policy." *Carey*, *supra*, 431 U.S. at 696 (plurality opinion).[42]

Moreover, when a fundamental right is infringed, this Court has generally held that the State must carefully tailor its statute to its legitimate objectives. See *Roe* v. *Wade*, 410 U.S. at 165, *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 485 n.8 (1983), *City of Akron*, 462 U.S. at 438. In the context of minors, this Court has not expressly held whether or how this requirement applies but should apply it when, as here, there is substantial infringement of the constitutional right.

Section 4 cannot withstand scrutiny under any of these tests. Accordingly, the statute is unconstitutional.

A. The Only Interest Actually Served By The Illinois Statute Is To Discourage The Pregnant Minor From Choosing An Abortion

When a minor's fundamental privacy right is burdened, the Court has examined with care the statutory

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[42] What is not clear is whether the fact that a minor's rights are involved somehow lowers the standard of judicial scrutiny or simply provides the State with an additional interest, not relevant to adults, of sufficient weight that it can justify certain otherwise impermissible burdens which it seeks to impose upon the minor's rights. *See H.L.* v. *Matheson*, 450 U.S. at 441-42 n.32 (Marshall, J., dissenting). In this case, the Court need not reach that question because, at best, the State could only justify its 24-hour waiting period under a rational relationship standard and it is clear that this Court's review must be more exacting than that when the minor's fundamental right has been substantially infringed.

purposes asserted by the State to ensure that they are significant. This Court has not accepted without question those purposes, but has evaluated them in the broader context of the State's statutory scheme. *Carey*, 431 U.S. at 694-95, 695 n.18; *Danforth*, 428 U.S. at 73-74. Such a careful examination of Illinois' particular statutory scheme in this case reveals that the asserted interest is totally at odds with general Illinois policy and is thus a mere pretext for the State's true purpose—discouraging minors from obtaining abortions.

The general rule in Illinois is to encourage minors to seek treatment for medical problems without requiring parental involvement. Thus, there is no requirement of parental consent before a minor receives treatment, counseling or care arising out of criminal sexual assault or abuse. Ill. Rev. Stat. ch. 111, § 4503(b) (1986). Furthermore, Illinois permits any minor 12 years of age or older to consent to medical care or counseling related to the diagnosis and treatment of any venereal disease, alcohol use or drug abuse, leaving the decision whether to notify the parents to the discretion of the person rendering treatment. Ill. Rev. Stat. ch. 111, § 4504 (1986). Despite the obvious health risks and the profound parental interest associated with these comparable areas of medical care involving minors, the State has found it unnecessary to require parental notification or any waiting period before treatment for these conditions.

In particular, the interest in parental consultation advanced by the State is suspect because Illinois has elected to allow *pregnant* minors to consent to *any* medical or surgical procedure other than abortion, without notification or consent of either parent and without a waiting period. Ill. Rev. Stat. ch. 111, § 4501 (1986). The language of § 4501 is unlimited, embracing everything from prenatal check-ups to open heart surgery. The medical risks to the minor, and the financial liability of the family of an unemancipated minor, would in many cases be much greater for these other medical procedures. As documented above, the long-term psychological, sociological, economic and physical consequences of teenage motherhood are often very grave. Yet Illinois does not require parental notification or a waiting period when a pregnant minor requests *any* medical procedure other than an abortion.

In its brief, the State itself notes that the need for parental involvement is no different when a minor decides to carry a pregnancy to term than when she seeks an abortion:

> The decision to terminate a pregnancy *or carry it to term* is a serious one. The fact that it is undertaken by an unmarried, dependent minor further underscores its complexity and highlights the need for adult guidance and support. That decision presents a host of factors to consider relevant to a minor's health, her well-being, her values, and her hopes and aspirations. It calls for a measured assessment of the options available to her and the consequences of choosing any one of them. *Whatever her choice, it is an irreversible one and one that may have a significant impact on her future life.*[43]

Br. for Appellant 45-46 (citations omitted; emphasis added). But Illinois law does not even require physicians to inform parents that their daughter is pregnant, although it compels physicians to inform parents that she may have an abortion. No explanation for this disparate treatment is offered.

In the context of Illinois' particular statutory scheme, the imposition of a mandatory 24-hour waiting period

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[43] The State's assertions here about the serious health and other consequences of a decision to carry a pregnancy to term contradicts this Court's statement in *Matheson* that "[i]f the pregnant girl elects to carry her child to term, the *medical* decisions to be made entail few—perhaps none—of the potentially grave emotional and psychological consequences of the decision to abort." 450 U.S. at 412-13. This Court's statement in *Matheson* may be read as merely characterizing Utah's view of medical facts. Obviously, that view is not correct if analyzed in the light of a more extensive presentation of medical facts than offered against the Utah view by the minor plaintiff-appellant in *Matheson*.

and two-parent notification on a minor's decision to terminate her pregnancy is thus more than anomalous. Instead, it indicates that the State's true purpose is to discourage minors from obtaining abortions. Compare *Carey*, 431 U.S. at 695 n.18.[44] That purpose, of course, will not withstand constitutional scrutiny and, for this reason alone, Illinois' 24-hour waiting period is invalid.[45]

B. The State Has Failed To Show That The Means It Has Chosen Are Adequately Related To Its Asserted Interests

As noted, once a minor's fundamental constitutional right has been infringed, the State bears the burden of demonstrating that a clear factual connection exists between the restriction it has imposed upon the abortion right of a minor and its asserted governmental interest. *Carey*, 431 U.S. at 696 and n.22. Even if the State statute does serve a "significant" interest, a bare assertion that the regulation which burdens the minor's fundamental right is related to that policy fails to satisfy the State's obligation to justify its statute. *Id.* at 696. It

[44] In *Carey*, the State asserted that its interest in deterring illegal sexual activity among minors justified its law prohibiting the distribution of contraceptives to those under age 16. However, when the Court examined this claim in light of other provisions of New York law, the Court determined that the general statutory scheme "argue[s] strongly against any conclusion" that the State's asserted interest was in fact an objective of the challenged restriction. 431 U.S. at 695 n.18.

[45] Appellants assert (Br. 44 n.20) that these anomalies do not undermine the State's interest in promoting "parental involvement in a minor's abortion decision" because the State is not required to "fine tune" its laws so as to facilitate abortions. As previously explained, the pregnant minor in *Matheson* completely failed to show that the Utah statute burdened her rights and therefore the distinctions in the statute were properly analyzed by this Court under a rational relationship standard. *Compare Harris* v. *McRae*, 448 U.S. 297 (1980). Where, as here, the statute does substantially burden a fundamental right, the Court has analyzed carefully the distinctions among the State's statutes to determine whether they have a credible factual basis. *Carey*, 431 U.S. at 695.

must show by legislative history, record evidence or judicially noticeable information that the relationship is a real one.

In *Doe* v. *Bolton*, this Court held Georgia's hospital accreditation requirement invalid because the state had failed to present "persuasive data" that only a hospital could meet the State's interest in insuring the quality of the procedure and the protection of the woman, whereas appellants and *amici* had presented the Court with "a mass of data" showing that facilities other than hospitals are adequate to perform safe abortions. 410 U.S. 179, 195 (1973). Similarly, in *City of Akron*, 462 U.S. at 487, this Court held that, if the interest asserted by the State is that of protecting the health of the mother, the "reasonably related" element of the test requires an inquiry into whether the state's requirements have a factual basis in accepted medical practice.

As *City of Akron*, *Doe* v. *Bolton* and *Carey* demonstrate, if the State asserts an interest in parental consultation, it is incumbent upon the State to show that its scheme will advance that interest, and it is appropriate for the Court to inquire carefully into the factual basis for the means chosen. Even the most cursory inquiry in the present case reveals a total absence of any factual basis for either the State's decision to require a 24-hour waiting period in addition to actual notification of both parents or for its decision to single out the abortion procedure.

The legislative "findings" recited at the beginning of the statute are the sole justification advanced by the State to support the 24-hour waiting period.[46] In enact-

[46] As recited in Section 2(b) of the Act, "[t]he legislature finds as fact that: 1) immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, 2) the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature, 3) the capacity to become pregnant and the capacity for mature judgment concerning the

ing this law, the state legislature conducted no hearings and received no expert testimony. In presenting its case to the courts below, the State chose not to present any factual evidence to support these or any other findings. See p. 8, *supra*. In particular, there is no evidence or finding to support the assertion that the mandatory 24-hour waiting period by itself will encourage any more parental involvement than is provided by the fact of actual notice to the parents. This Court's holding in *Matheson* assumed that the requirement of parental notification does in fact lead to parental consultation before the abortion. This assumption is supported by studies showing that when a minor is confronted with parental notification requirements, she does inform her parents and discusses the decision with them before having the abortion.[47]

The State's assertion that notification without a waiting period would be "hollow" (Br. for Appellant 47), is thus contrary to this Court's ruling in *Matheson*, is refuted by the evidence and is contrary to experience. At least 5 states provide for notification without any waiting period.[48] Moreover, the State's claim of "hollowness" is itself nothing more than a bare assertion that lacks any evidentiary basis, which this Court clearly has held is insufficient. *Carey*, 431 U.S. at 696.

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wisdom of an abortion are not necessarily related, 4) parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child, and 5) parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion. The legislature further finds that parental consultation is usually desirable and in the best interests of the minor."

[47] Torres, Forrest & Eisman at 288.

[48] Ariz. Rev. Stat. Ann. § 36-2152 (1986); La. Rev. Stat. Ann. § 40:1299.35.5 (1986); Md. Health Gen. Code Ann. § 20-103 (1982); Mont. Code Ann. § 50-20-107(b) (1985); Utah Code Ann. § 76-7-304 (1978).

This utter lack of any factual basis to support the State's choice of means is particularly troubling when viewed in context of the evidence about the relative health risks of abortion. The legislative record makes clear that the State has made no effort to understand the medical facts surrounding the abortion decision. For example, the Act states as a legislative finding that "the medical, emotional, and psychological consequences of abortion are serious . . . ." Ill. Rev. Stat. ch. 38, ¶ 81-62 (1986). All medical data, however, confirm that an abortion is a medical procedure that poses no greater risk, and is often less risky, than other procedures associated with pregnancy. A patient undergoing an abortion during the first 8 weeks of pregnancy faces one quarter the risk of death compared to a patient receiving a penicillin injection for gonorrhea.[49] When a physician performs a Cesarean section on a pregnant woman, the risks of mortality are between 15 and 30 times greater than for an abortion.[50] It is therefore utterly irrational for Illinois to require parental notification and a waiting period before a pregnant minor can receive an abortion, when that same pregnant minor could consent to an equally or more risky injection of penicillin if she had gonorrhea or to other much more risky procedures

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[49] For the period 1972 through the end of 1978, the mortality rate for intramuscular penicillin injections administered to gonorreha patients was 2 deaths per 100,000 injections (D. Grimes, *Abortion and Health* at 3), whereas risk of death per 100,000 abortions performed during the first 8 weeks is .5. *See* n.33, *supra*.

[50] The mortality rate for a legal abortion (based on an average of all gestational weeks) is 2.2 deaths per 100,000 procedures. *See* n.26, *supra*. The risk of death attributable to a Cesarean section delivery is estimated to be between 30.9 and 59.3 deaths per 100,000 Cesarean deliveries. Petitti, *Maternal Mortality and Morbidity in Cesarean Section*, 28 Clinical Obstetrics and Gynecology 763, 764 (1985). The percentage of women of all ages who have babies delivered by Cesarean section is rapidly increasing—in 1965, the rate was 4.5 percent of all deliveries, and in 1985 the rate for women under age 20 had risen to 16.1 percent. Placek & Taffel, *Cesarean Rate Increases in 1985*, 77 A.J.P.H. 241, 242 (1987).

such as a Cesarean section, without parental notification or a mandatory waiting period.

Because the State has presented no facts to show that a waiting period, beyond notification, will advance the goal of parental consultation and because the State has offered no factual basis for singling out the abortion procedure in imposing such a requirement, this Court should, as it did in *City of Akron*, hold the mandatory waiting period invalid.

C. The Mandatory Waiting Period Is Not Narrowly Tailored To The State's Interest

1. State laws that interfere with or burden a fundamental right also must be carefully tailored to the State's objective. See *Roe* v. *Wade*, 410 U.S. at 165; *Ashcroft*, 462 U.S. at 485 n.8; *City of Akron*, 462 U.S. at 438. The regulation must be reasonable and not overbroad, that is, the law must advance the State's compelling interest without additional and unnecessary interference with the fundamental right. *City of Akron*, 462 U.S. at 438. In the absence of a clear holding by this Court to the contrary, some requirement of "narrow tailoring" should apply here because the constitutional privacy right, albeit of a minor, is heavily burdened. Section 4 of the Parental Notice of Abortion Act, which imposes a mandatory 24-hour waiting period requirement, is unconstitutional because it is not tailored at all to the State's asserted interests.

First, the mandatory waiting period impermissibly requires a minor who already has the consent of both parents nevertheless to wait 24 hours until she is permitted to have an abortion or instead to follow even more burdensome requirements in order to receive an abortion.[51] Such a minor stands in precisely the same consti-

[51] Section 7 permits a minor to avoid the mandatory 24-hour waiting period in only two circumstances. First, she can proceed immediately if she actually brings *both* of her parents with her when she goes to the physician. Second, she can bring the physician signed, notarized statements from both parents indicating that they have been told of her intent to obtain an abortion. Ill. Rev. Stat. ch. 38 ¶ 81-67 (1986). The court of appeals correctly held that these two exceptions would almost invariably take more than 24 hours to comply with, and thus did not serve in any way to diminish the burden of the mandatory waiting period.

tutional position as the adult woman in *City of Akron*. This Court held in *City of Akron* that once a woman has given informed consent, the State may not demand that she delay the effectuation of her decision. 462 U.S at 426.

In the present case, none of Illinois' interests is advanced by requiring a minor to delay effectuation of her decision which was made in consultation with her parents. As the court of appeals noted, the statute does not provide any exception in such circumstances, but only offers alternative provisions that are themselves more burdensome and time-consuming than the mandatory 24-hour waiting period. J.S. App. 8-9. As this Court has held in relation to a similar restriction on a minor's privacy right, "[t]his narrow exception, however, does not save the statute. As we have held above, . . . less than total restrictions on access . . . that significantly burden the right to decide whether to bear children must also pass constitutional scrutiny." *Carey*, 431 U.S. at 697. The requirements here do not.

Second, the mandatory waiting period fails to provide exceptions for recurring problems that physicians face. First, there is no exception for the minor who lives in a single parent household where her mother is not married to her father. As one court has found on the basis of an extensive factual record, notification of such a long-absent, noncustodial parent and facilitation of consultation with that parent by applying the mandatory waiting period may be very disruptive and unhelpful to the minor. *Hodgson* v. *Minnesota*, 648 F. Supp. at 764-65. Second, there is no exception to the notification and waiting period requirements when the physician, minor, and notified parent reasonably fear that the second parent

will become abusive if notified and given an opportunity to confront the minor. Requiring notification and a waiting period to encourage involvement of the abusive parent just prior to an anticipated abortion palpably and unnecessarily burdens the minor's privacy right without advancing the state's interest.

Finally, the vagueness inherent in the notice and waiting period provision adopted by Illinois will clearly cause some minors to lose their constitutional right to have an abortion without serving any legitimate interest of the State. In contrast to general Illinois law regarding non-pregnant minors which requires the consent of only one parent, see p. 7, *supra*, the Illinois statute at issue here requires physicians, or their agents, under pain of criminal sanction, to provide "actual notice" to *both* parents of an unemancipated minor, unless one or both parents are not "available . . . in a reasonable time or manner." Ill. Rev. Stat. ch. 38 ¶ 81-64 (1986). The statute, however, makes no effort to specify what legitimate criteria a physician should use in deciding what is "reasonable." The statute does not indicate whether the decision should be made on the basis of medical risk or the difficulty of discovering the missing parent or both sets of considerations.

In short, the statute places the physician in a position in which he can take no action until he is willing to gamble that a court or jury will accept his conclusion that the parents of his patient were not available in a "reasonable time or manner." Under these circumstances, few physicians, if any, will undertake to perform an abortion unless actual notice has been effected on both parents. The risk of prosecution is too great. Thus, even though the physician has in fact notified one parent, he will still not be able to perform a medically indicated abortion because the State's scheme is enforced criminally and imposes unclear requirements on the physician. See *Colautti*, 439 U.S. at 396 (vague criminal abortion statutes "could have a profound chilling effect on the

willingness of physicians to perform abortions. . . .")[62] This problem is especially severe when a physician is only available in a community once a week and sound medical practice indicates that to avoid additional risk an abortion should be performed promptly on a minor.

In sum, before a state can burden a constitutional right, it must take care that its statute not be manifestly over-inclusive. Section 4 clearly sweeps too broadly in burdening the rights of minor females and is therefore unconstitutional.

2. Appellants argue (Br. of Appellant 39, 41-42) that by providing a judicial by-pass procedure, the State has narrowly tailored its regulation in accordance with constitutional requirements. That argument is incorrect. *Carey*, 431 U.S. at 697, *Bellotti* v. *Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring).

The judicial by-pass arrangement is completely irrelevant to the validity of the mandatory 24-hour waiting period after actual notice has been effected. For the reasons stated earlier, the waiting period significantly burdens some minors who have consulted with their parents but cannot comply with the burdensome requirements for showing consent in order to avoid the 24-hour delay. For these minors, the judicial by-pass is irrelevant; they have no need to by-pass their parents. Thus, the alternative procedure does not cure the constitutional defect for minors who have their parents' approval.

More fundamentally, it is simply not permissible for a state to enact a law designed to burden a fundamental

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[62] Although *Colautti* discussed the issue in terms of the void-for-vagueness doctrine, the issue is very close conceptually to the requirement that the statute be narrowly tailored. By failing to specify with precision when the statute burdens the abortion right, the statute necessarily sweeps too broadly and is therefore suspect. When the State goes further and imposes criminal sanctions as the means of enforcing its restrictions, then it exacerbates the problem by causing physicians to refuse to provide abortions. Thus, the waiting period requirement in this case can be attacked under either theory.

constitutional right and avoid having the statute declared unconstitutional by funneling those subject to its restrictions into a costly and burdensome judicial process, which may permit the minor to obtain a waiver from the general obligations of the law. See *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (striking down state statute notwithstanding opportunity for judicial waiver). As the court of appeals pointed out, the judicial by-pass cannot be implemented within 24 hours. Thus, the burden on the minor's right occasioned by delay is not eliminated or even reduced by the opportunity to litigate the issues of maturity or the minor's best interest in a state court. Thus, the by-pass option does not cure the basic infringement of the minor's right and therefore cannot salvage the constitutionality of the waiting period requirement.

The logical extension of appellants' argument that a judicial by-pass itself satisfies the requirement that the state's means must be closely tailored to its significant interests would permit a state constitutionally to require a physician to wait one month after notification before performing the abortion, so long as a judicial by-pass procedure is available. Obviously, such a mandatory waiting period would not pass constitutional muster. Similarly, under appellants' theory, the 24-hour waiting period for an adult, which the Court struck down in *City of Akron*, could have been saved by permitting the woman to bring a notarized statement from her husband or close friend indicating that they had discussed the abortion decision carefully and that the woman's consent was fully informed. But such a waiver could not cure the constitutional defect in *City of Akron*. It is clear that, if the state cannot burden the right in the first instance, it cannot avoid a constitutional challenge to the statute by providing an exemption to it.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals striking down the mandatory 24-hour waiting period in Section 4 should be affirmed.

Respectfully submitted,

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BRIEF

No. 85-673 (10)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

—vs.—

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all Illinois physicians performing or desiring to perform abortions and on behalf of their minor patients desiring abortions,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICI CURIAE IN SUPPORT OF APPELLEES BY

The certified classes of Pregnant Minors Desiring Confidential Abortions in Minnesota and Massachusetts; Certain Abortion Providers in Minnesota and Massachusetts Desiring to Give Confidential Abortions to Minors; A Single Custodial Parent of a Pregnant Minor in Minnesota; the American Jewish Congress on Behalf of its Members in Minnesota and Massachusetts; and the Anti-Defamation League of Minnesota and Massachusetts.

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INTEREST OF AMICI

The *amici* are pregnant minors, a single custodial parent of a pregnant minor and abortion providers from the states of Minnesota and Massachusetts, the American Jewish Congress on behalf of its members in Minnesota and Massachusetts, and the Anti-Defamation League in Minnesota and Massachusetts. All of *amici* except the American Jewish Congress and the Anti-Defamation League are currently plaintiffs in two separate lawsuits, one challenging the constitutionality of a two-parent notification law "as applied", *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *appeal docketed* No. 86-5423 (8th Cir. Nov. 18, 1986), *petition for cert. filed*, No. 86-882 (U.S. Nov. 28, 1986) (Hodgson),[1] and the other challenging a two-parent consent statute in operation and "as applied." *Planned Parenthood League of Massachusetts v. Bellotti*, No. Civ. 80-1166-MA (D. Mass.).[2]

The American Jewish Congress is a national organization of American Jews with approximately 100 members in Minnesota and 1000 in Massachusetts. It neither favors nor opposes abortion but believes that a woman's decision, and particularly a minor woman's decision, must be her own, uncoerced by government.

The Anti-Defamation League of B'nai B'rith is a national human rights organization of American Jews, organized to

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1 Plaintiffs to this action are: Jane Hodgson, M.D., Arthur Horowitz, M.D., Michelle Roe, Alice Roe, Diana Roe, Nadine T., Janet T., and Ellen Z., individually and on behalf of all other persons similarly situated; Lauren Z., Meadowbrook Women's Clinic, Planned Parenthood of Minnesota, Midwest Health Center for Women, Women's Health Center of Duluth. *Hodgson v. Minnesota*, 648 F.Supp 756 (1986) is reprinted as Appendix A to this brief. Page numbers followed by "a" indicate that the document or information being cited appears in the appendix.

2 *See interlocutory decision at id.*, 641 F.2d 1006, 1011 (1st Cir. 1981) (rejecting facial challenge; noting absence of evidence "as to the actual operation" of statute), and 608 F.Supp. 800, 803 (D. Mass. 1985) (describing fact-finding efforts of plaintiffs regarding "the operation of the . . . judicial consent process"). Plaintiffs to this action are Planned Parenthood League of Massachusetts, Crittenton Hastings House & Clinic, Philip G. Stubblefield, M.D., Jane Doe, and all others similarly situated in Massachusetts.

advance good will and mutual understanding among Americans of all creeds and races and to secure justice and fair treatment for all.

Amici seek to inform this court about the surprisingly uniform and disastrous consequences that result from the actual operation of mandatory parental involvement laws, and particularly the judicial bypass scheme upon which appellant relies to cure the unconstitutional 24 hour waiting period.

Summary of Argument

This Court should dismiss the appeal for lack of proper jurisdiction and deny certiorari for prudential reasons.[3] If the Court, however, does reach the merits, this Court must affirm the judgment of the Seventh Circuit, 763 F.2d 1532 (7th Cir. 1985), and hold unconstitutional the Illinois mandatory 24 hour waiting period.

The question before this Court presumes that the existence of a bypass scheme cures any burdens on privacy: "Whether Illinois may constitutionally impose a waiting period, applicable only to minors and incompetents, after parental notification but before an abortion is performed, *where it also provides a judicial alternative to notification.*" *Hartigan v. Zbaraz*, 55 U.S.L.W. 3247 (U.S. Oct. 14, 1986) (emphasis added). Accordingly, appellants argue that the burdens imposed both by the waiting period and by the parental notice requirement itself are cured by the judicial bypass alternative. (Appellants' Brief at 16, 37, 39, 41, *passim*). Experience and scientific research, however, establish that the judicial bypass procedure itself is a "*de facto*" waiting period that causes significant harm to minors and their families without any compensating benefits.

In *Bellotti v. Baird*, 443 U.S. 622 (1979) (Bellotti II) this Court had before it neither a facially constitutional statute nor a factual trial record as to the actual effects of a judicial bypass scheme. Nevertheless a plurality of the Court hypothesized that if mandatory parental involvement laws contained a judicial

3 *Amici* hereby incorporate Appellees' jurisdictional argument contained in Point I of their brief to this Court.

bypass alternative, such statutes would promote legitimate state interests and at the same time provide minors access to the abortion choice the Constitution requires.

To the contrary, over five years of experience with the parental consent and notification statutes in Minnesota and Massachusetts, the findings of fact subsequent to the five week trial of *Hodgson v. Minnesota*[4] and a substantial body of recent scientific data,[5] demonstrate that the predicted benefits of these statutes are illusory and the predicted burdens undeniable.[6]

The trial court in the challenge to the Minnesota two parent notification law in *Hodgson* heard extensive testimony by single parents, minors, abortion clinic nurses and counselors as well as nationally reknowned physicians, psychologists, psychiatrists and reproductive epidemiologists. State court judges, guardians *ad litem* for the minors and public defenders testified as to the implementation of the judicial bypass procedure

4 *See*, 648 F. Supp. 756 (D.Minn. 1986), *appeal docketed* No. 86-5423 (8th Cir. Nov. 18, 1986), *petition for cert. filed*, No. 86-882 (U.S. Nov. 28, 1986).

5 *See, e.g.*, Melton, *Legal Regulation of Adolescent Abortion, Unintended Effects*, 42. Am. Psychologist 79 (1987) [Melton] (Evaluation of purposes of judicial bypass procedures and parental involvement statutes in light of recent scientific findings and data from Massachusetts, Minnesota and nationally); Pliner & Yates, *The Massachusetts Judicial Consent Hearing: Is It a Rubberstamp Proceeding?* Presented at the 94th Annual Meeting of the American Psychological Association, Washington, D.C., August, 1986 [Pliner] (attached as Appendix B) (A Massachusetts study of 477 minors' petition; Cartoof & Klerman, *Parental Consent for Abortion: Impact of the Massachusetts Law*, 76 Am. J. Pub Health 397(1986) [Cartoof] (This study assessed the impact of the Masachusetts parental consent law after 20 months of operation); Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 Fam. Plan. Persp. 259 (1983) (A study of the operation of parental involvement statutes in Massachusetts, Minnesota, and Rhode Island).

6 Justice Stevens' predictions in *Bellotti II* have been more than fulfilled. "As a practical matter, I would suppose that the need to commence judicial proceedings in order to obtain a legal abortion would impose a burden at least as great as, and probably greater than, that imposed on the minor child by the need to obtain the consent of a parent." *Bellotti II*, 443 U.S. at 655 (Stevens, J., concurring).

from August, 1981 through January, 1986. The evidence overwhelmingly proved that Minnesota's five year experiment with minors' lives was a dismal and unmitigated failure.[7]

Family communication is *not* fostered by notification or consent requirements. At 13a, 33a, 34a, 37a and 38a. Experience in Minnesota and Massachusetts[8] demonstrates that the judicial bypass scheme neither provides a viable option for all teenagers who need confidential abortions, nor does it identify or help any immature, non best-interests minors. At 11a. There are no benefits which can be balanced against the traumatic impact on a pregnant minor.

It is these facts which *amici* believe are critical to the case before this Court. Legislation which burdens a fundamental right may not be justified by "archaic and overbroad generalizations" unsupported by evidence of any kind. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 730 n.16 (1982). "[T]he constitutionality of a statute predicated upon

7 In *Hodgson*, the court stated that were it writing on a clean slate, the Minnesota statute would be unconstitutional because it failed to accomplish any state interests and unduly burdened minors. However, the court held that *Planned Parenthood Ass'n. of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983) [*Ashcroft*], precluded judicial review of the statute in its entirety and left the court with discretion only to review issues of statutory construction. At 34a-35a. The *Hodgson* court found the two parent requirement substantially burdensome and invalidated it facially and as applied, and enjoined the entire statute because of the inseverability of this requirement. At 37a-39a.

8 The experiences of Minnesota and Massachusetts demonstrate the functional equivalence *for minors* of parental notice and parental consent. *See Akron*, 462 U.S. 416, 427 n.10 (equating consent and notice statutes, "these state and parental interests must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement"). In Minnesota, clinics exposed to criminal liability for failure to give parental notice, required parents to sign notarized statements acknowledging notification. Some parents refused to sign because they believed it meant they consented to the abortion. Hodg. Tr., Stacy at 1800; *id.*, Smith at 62.

Though the Massachusetts law requires parental consent, Judge Paul Garrity, who had heard approximately 200 judicial bypass cases, and who testified at the *Hodgson* trial, could not recall one instance where a minor resorted to court *after* consent was refused by the parents; Massachusetts minors went to court to avoid the initial notification. *Id.*, Judge Garrity at 1328.

the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938); *see, e.g., In re Gault*, 387 U.S. 1, 21-29 (1967); *Brown v. Board of Education*, 347 U.S. 483 (1954).[9]

Even if the consequences were not necessarily predictable from the face of these laws,[10] years of enforcement in Massachusetts and Minnesota reveal their devastating, and constitutionally impermissible impact.

I. PARENTAL INVOLVEMENT STATUTES DO NOT SERVE THEIR LEGISLATIVE PURPOSES.

A. Because The Fully Developed Factual Record In *Hodgson* Conclusively Demonstrates That A Parental Notice, Scheme Undermines Any Asserted State Interest, This Court Should Not Review The Illinois Statute.

This case comes to the Court without a factual trial record as to the actual effects of a mandatory waiting period and a judicial bypass. The issues raised by this case would be more appropriately evaluated upon this Court's review of *Hodgson v. Minnesota*.[11] The fully developed facts in the *Hodgson* case

9 The conclusion of this Court in *Brown v. Board of Education* that the "doctrine of 'separate but equal' has no place" in the field of public education, 347 U.S. at 495, was based upon review of the actual operation of that doctrine in four communities in four states and upon review of the relevant scientific literature. "Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority." *Id.* at 494. This Court did not limit its finding to those four communities but instead concluded that the evidence from those communities proved the challenged doctrine to be "inherently unequal" and unconstitutional. *Id.* at 495.

10 "When the Court began to consider such issues in the mid-1970's few studies had focused directly on adolescents' decision making about health matters . . . [A] substantial body of research directly relevant to minors' exercise of self-determination has developed in recent years. . . ." Melton & Russo, *Adolescent Abortion Psychological Perspectives on Public Policy*, 42 Am. Psychologist 69, 70 (1987).

11 Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, at 20-24, *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986), *appeal docketed* No. 86-5423 (8th Cir. Nov. 18, 1986), *petition for cert. filed*, No. 86-882 (U.S. Nov. 28, 1986).

demonstrate that the Illinois statute with its 24 hour waiting period and the bypass procedure like the Minnesota statute, if implemented, would undermine rather than promote the statutory purposes. These purposes, as stated by the Illinois legislature are:

> 1) protecting minors against their own immaturity, 2) fostering the family structure and preserving it as a viable social unit, and 3) protecting the rights of parents to rear children who are members of their household.

Ill. Ann. Stat. ch. 38 para. 81-62 (Smith-Hurd 1983).

The *Hodgson* court concluded: "[F]ive weeks of trial have produced no factual basis upon which this court can find that [the statute] on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." At 32a-33a.

The court's evaluation is consistent with that of the established scientific community. The National Academy of Sciences recently found, "that there is no scientific basis for restricting the availability of abortion to adolescents . . . [T]he panel concludes that minor adolescents should be encouraged, *but not required*, to involve their parents and partners in the decision making process."[12]

The Illinois statute recites certain "factual findings" as the basis for the statute's legislative purposes.[13]

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12 *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* at 9-10 (C. Hayes ed. 1986) [*Risking*] (emphasis added). This report was produced by the Panel on Adolescent Pregnancy and Childbearing of the National Academy of Sciences and reviewed according to the formal committee report procedures. The Panel was formed in 1984 to conduct "a broad and dispassionate review of relevant research and program experience [concerning teenage pregnancy] and to recommend approaches for policy formation, program design, research, and evaluation." The 15 people on the interdisciplinary panel were chosen for their special competences and to ensure an appropriate balance. Forward to *Risking*, at x. *See also*, Melton, *supra* note 5, at 82.

13 These factual findings include the presumption that "immature minors often lack the ability to make fully informed choices," and that "the medical, emotional, and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature"; that "parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child"; and that "parents will ensure proper after care when they are aware of their child's abortion operation." Ill. Ann. Stat. ch. 38, para. 81-62 (Smith-Hurd 1983).

These "factual findings" were adopted almost verbatim from *dicta* in this Court's review of the *facial* validity of mandatory parental involvement laws.[14] However, the facts now available confirm that these assumptions about pregnant minors are unfounded.

B. At All Stages Of Pregnancy, Abortion Is Safer Than Childbirth And Forced Parental Notification Undermines This Safety.

Contrary to the "facts" assumed by the Illinois Legislature, abortion is one of the safest surgical procedures doctors perform.[15] Abortion is safer the earlier in pregnancy it is performed, though at no time during pregnancy do the risks of abortion surpass the risks of continuing the pregnancy to delivery.[16] The same is true for rates of morbidity related to

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14 *Bellotti II*, 443 U.S. at 634 (immature minors lack ability to make fully informed choices); *H. L. v. Matheson*, 450 U.S. at 411 (parents can provide necessary medical information; there are serious physical and psychological consequences of the abortion decision particularly when the patient is immature).

15 *Risking*, *supra* note 12 at 9. Complications following induced abortion are generally lower among adolescents than among older women, regardless of the gestation at which the abortion is performed or the method used. *Id.* at 125; *see also*, Cates, *Adolescent Abortions in the United States* 7 J. Adolescent Health Care, 18, 19-22 (1980) [Cates]; Cates, et al., *The Risks Associated With Teenage Abortion*, 309 New England J. of Medicine 621 (1983).

16 The later the abortion is performed the greater the health risks. The risk of death from abortion is doubled when a woman is delayed four weeks and receives her abortion at twelve weeks gestation instead of eight weeks. It is important to note, however, that *at no time* during pregnancy is the mortality rate for abortion higher than that for childbirth. Tietze & Henshaw, *Induced Abortion: A World Review 1986*, Alan Guttmacher Institute (1986).

childbirth when compared to abortion.[17] Furthermore, childbearing for minors *is* significantly riskier than for adults.[18]

The Illinois Legislature's statement that the emotional and psychological consequences of abortion are "serious and can have a lasting effect," is incorrect. An *unwanted pregnancy* is a serious and emotionally upsetting event in a teenager's life. In fact, before abortions were legal and accessible to minors in a confidential manner, studies show that a large proportion of teenage girls who attempted or succeeded in suicide thought they were, or actually were pregnant.[19] While an unwanted pregnancy can be traumatic, international studies conclude that the consequences of abortion are not serious.[20] Psychological sequelae of abortion can be both positive and negative; few teenagers have adverse reactions and most are relieved to have terminated the unwanted pregnancy.

The Legislature's statement also implies that abortion consequences are more "serious" than psychological consequences of continued pregnancy, childbirth and unwanted motherhood

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17 Cates, *supra* note 15 at 20; Cates & Grimes, *Morbidity and Mortality of Abortion in the United States*, in Abortion and Sterilization (J. Hodgson ed. 1981). Teenagers, particularly younger teenagers, have a two and a half times greater risk of death from continued pregnancy or childbirth than adult women. Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* at 29 (1981) [AGI].

18 *Risking*, *supra* note 12 at 123. These greater health risks for minors are probably due, at least in part, to lack of adequate nutrition and appropriate prenatal care. *Id.* at 124, (citing Inst. of Medicine, Preventing Low Birthweight (1985)); Baldwin & Cain, *The Children of Teenage Parents*, 12 Fam. Plan. Persp. 34 (1980).

19 Teicher, *A Solution to the Chronic Problem of Living: Adolescent Attempted Suicide*, in Current Issues in Adolescent Psychiatry 129, 136 (J. Schoolar ed. 1973).

20 In 1978, the World Health Organization concluded that "there is now a substantial body of data reported from many countries . . . suggesting frequent physical benefit and low incidence of adverse psychological sequelae" due to abortion. Hodg. Tr., Dr. David at 2532 (3/13/86). (*Amici* use this format to refer to the Transcript of Record in the Minnesota District Court case, *Hodgson*).

since parental involvement is only mandated for minors seeking abortion. However, "childbearing . . . has far more serious effects . . . [and] research does not support the contention that adolescents are vulnerable to serious psychological harm as a result of abortion."[21] In fact, there is solid scientific evidence that pregnancy continuation poses "far greater psychological, physical, and economic risks to the adolescent than does abortion."[22]

Finally, the legislature assumed that involuntary notice would help alleviate any adverse repercussions of an abortion. All the evidence, however, suggests just the opposite. While having two loving parents available is the optimal situation for any minor, this unfortunately, is frequently not possible.[23] Forced notice can exacerbate problems[24] and worse yet the search for privacy can lead to death.[25]

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21 Interdivisional Comm. on Adolescent Abortion of the American Psychological Association, *Adolescent Abortion Psychological and Legal Issues*, 73-93, 75 (Jan., 1987) [Interdivisional Comm.].

22 Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84, 87 (1987) [Lewis]; *see also* Adler & Dolcini, *Psychological Issues in Abortion for Adolescents*, 74-95 and Marecek, *Consequences of Adolescent Childbearing and Abortion*, 96-115 in Adolescent Abortion: Psychological & Legal Issues 96-115 (Melton ed. 1986). The only United States study controlling for both young women giving birth and young women having abortions, found striking evidence that women who utilized abortions were able to realize their family goals; they avoided subsequent unwanted pregnancies and their subsequent births were overwhelmingly intended or wanted. Hodg. Tr., Dr. David at 2532 (3/13/86).

23 Only 50% of the minor *amici* actually live with both biological parents. *See also*, discussions *infra*, Section I,E.

24 Hodg. Tr., Dr. Walker at 310-316 (2/12/86).

25 A U.S. Centers for Disease Control analysis of the 17 deaths from illegal abortions that occurred 1975-79 reported:

> A 15-year-old schoolgirl was found dead in the bathroom of her home. During attempts by her mother to revive her, a plastic tube fell from her vagina. Autopsy revealed a penetrating wound of the vesicovaginal region and a 22-week-old fetus. . . . The girl was an honor student at a Roman Catholic girls' school. At the time of the girl's

By making inaccurate assumptions and ignoring the facts, the Illinois legislature utterly failed to legislate with a "particular sensitivity" for a minor's abortion decision. *Bellotti II*, 443 U.S. at 642.

C. Delay Is The Single Most Significant Risk Factor For Teenagers Who Have Abortions And Parental Notification Statutes Increase Delay.

For various reasons, "[t]eenagers are less likely than women in their twenties to obtain abortions during the safer, earlier weeks of gestation.[26] Dr. Willard Cates, former head of the Abortion Surveillance Branch of the United States Centers for Disease Control, has concluded that "delay [in getting an abortion] has the largest single effect on the risk to teenagers for complications and death from abortion."[27]

These reasons for delay include limited access to abortion services particularly in rural areas. The need to travel long distances to clinics or hospitals that provide abortion services, as well as the expense, limit teenagers' access and increase delays. In addition, many teenagers, particularly the very young, fail to recognize the early signs of pregnancy; many

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> death, her mother did not know that she was pregnant, . . . Her mother was unaware that she was sexually active. The mother had six other children and had had an induced abortion . . . Since that time, she had stressed to her children that abortion was murder.

The report concludes:

> *A desire for secrecy* was the primary reason four women sought illegal abortions and was a secondary factor for five others. Women . . . perceive that illegal abortion affords more privacy than a legal procedure.

Binkin, Gold, Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring*, 14 Fam. Plan. Persp., 163, 165 (1982) (emphasis added).

26 *Risking supra* note 12 at 114. A national survey found that only 34% of abortions obtained by girls ages 15 and younger are performed during the first eight weeks of gestation, compared with 41% of abortions obtained by girls ages 15-19, and 51% of those obtained by women ages 20-24. AGI, *supra* note 17. Adolescents (19 and under) are twice as likely as older women to obtain abortions after twelve weeks. Cates, *supra* note 15, at 20 (1980).

27 *Id.*

adolescent girls ordinarily experience menstrual irregularities and therefore do not distinguish them from early signs of pregnancy.[28]

D. Minors Are Capable of Informed Consent And Existing Law Already Ensures that Minors Give Informed Consent for All Medical Procedures.

The scientific community has established that pregnant minors are generally capable of granting informed consent to the abortion procedure.[29]

By all available measures,[30] minors are on average indistinguishable from adults in their ability to understand and reason about health care alternatives.[31] And minors are specifically capable of making reproductive decisions such as whether or

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28 *See e.g.*, AGI, *supra* note 17; *Risking supra* note 12 at 114; Russo, *Adolescent Abortion: The Epidemiological context*, in Adolescent Abortion: Psychological and Legal Issues, 40-73 (Melton ed. 1986), Bracken & Kasl, *Delay in seeking induced abortion: A review and theoretical analysis*, 121 Am. J. of Obstetrics and Gynecology 1008-1019 (1975).

29 *See e.g.*, Interdivisional Comm., *supra* note 21 at 73; Melton, *Developmental Psychology and The Law: The State of the Art*, 22 J. of Family Law, 445-482, 463-466 (1984) (and citations therein); Kaser-Boyd, Adelman, & Taylor, *Minors' Ability to Identify Risks and Benefits of Therapy*, 16 Prof. Psychology: Research and Prac. 411 (1985); *see generally*, *Children's Competence to Consent* (Melton, Koocher, Saks, eds. 1983).

30 Experts measure competency in decision-making by examining ability to make and express a preference among alternatives, ability to understand and appreciate the nature and consequences of a particular choice, ability to reason about alternatives and rationally weigh risks and benefits, and ability to arrive at an objectively reasonable choice. Meisel, Roth & Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 Am. J. 285 (1977); Roth, Meisel, & Lidz, *Tests of Competency to Consent to Treatment*, 134 Am. Psychiatry 279 (1977).

31 Although it is of course true that some minors do not use these abilities in what would appear to be an objectively mature way, it is equally true that most adults would fail some of the available tests of competency on occasion. Lidz, Meisel, Zerubavel, Carter, Sestak & Roth, *Informed Consent: A Study Of Decision Making In Psychiatry* at 26-30 (1984) (and citations therein).

not to terminate a pregnancy.[32] By age 14, adolescents have developed their own sense of conscience and morality[33] and are capable of weighing such factors in making an abortion choice consistent with their own sense of what is right for them.[34]

State statutes authorizing minors to consent to treatment for venereal disease[35] and prenatal medical care (including caesarian section surgery)[36] without parental consent or notification reflect both that the vast majority of states recognize minors are capable of giving informed consent for medical treatment, and that confidentiality is necessary to ensure minors receive medical treatment for matters touching on sexual privacy. Additionally, some states have developed the rule that "mature minors" can consent to all types of medical care,[37] and twenty-two states by statute permit minors to consent to medical treatment for their own children.[38] In some states these statutes

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32 Interdivisional Comm., *supra* note 21 at 53; Lewis, *A Comparison of Minors' and Adults' Pregnancy Decisions*, 50 Am. J. Orthopsychiatry 446 (1980); Lewis, *supra* note 22; Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis*, in Adolescent Abortion: Psychological and Legal Issues 1, 18-19 (1986).

33 *See generally*, L. Kohlberg, *The Psychology of Moral Development* (1985); Mozal, *Development and Behavior* (T. Lickona ed. 1976).

34 *See* Smetana, *Reasoning in the Personal and Moral Domains: Adolescent and Young Adult Women's Decision Making Regarding Abortion*, 2 J. Applied Dev. Psychology 211 (1981).

35 *See* Appendix C(1) at 58a for state statutes authorizing minors to consent to treatment for venereal disease.

36 *See* Appendix C(2) at 59a for state statutes authorizing minors to consent to prenatal care. Lack of confidentiality also discourages teens from seeking necessary prenatal care. Cates, *Abortions For Teenagers*, in Abortion and Sterilization Medical and Social Aspects 144 (J. Hodgson ed. 1981); AGI, *supra* note 17 at 16; *Social Factors, Not Age, Are Found To Affect Rise Of Low Birth Weight*, 16 Fam. Plan. Persp. 142-143 (1984); Cates, *supra* note 15 at 20; *Risking*, *supra* note 12 at 114.

37 *See* Appendix C(3) at 60a for state "mature minors" statutes.

38 *See* Appendix C(4) at 60a for state laws permitting minors to consent to medical treatment for their own children.

sit side by side with those that impose parental involvement requirements when the pregnant teenager chooses abortion.[39]

Furthermore, existing law and medical practice already ensures that minors give informed consent for abortion services. Physicians have a legal and ethical responsibility to ensure that the patient is capable of giving such consent.[40]

E. Minors Who Seek Confidential Abortions Have Good Reasons For Not Notifying One Or Both Parents Of Their Pregnancies.

With or without mandatory parental involvement laws, approximately 50% of all pregnant minors tell one or both parents about their pregnancy and nearly all the younger minors do.[41] Those minors who do not want to involve both parents have good reasons.

Amici testified in the *Hodgson* case that their decisions not to tell one or both of their parents of their pregnancy or abortion decision were due to: psychiatric or physical illness of a parent; chemical abuse and dependancy of a parent; religious or moral anti-abortion or anti-sex views of a parent; likelihood of abusive verbal, physical or sexual response by a parent; and the fact that the minor never had met the parent.[42]

Nationwide data affirms the Minnesota experience.[43] For example, one third of the minors in one study explained that

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39 Compare state statutes authorizing minors consent in Appendix C(1)-(4) with the states which have either parental notification or consent legislation. *See* Appendix C(5) at 61a for state laws mandating parental consent or notification.

40 Meisel, Roth & Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 Am. J. 285 (1977).

41 *Hodgson* at 19a; Hodg. Tr., Wendt at 29-30 (2/10/86); AGI, *supra* note 17 at 56.

42 Hodg. Tr., Sharon L. at 715-20 (2/19/86); Hodg. Tr., Mary J. at 634-35 (2/18/86).

43 Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification* in Am. J. of Pub. Health 283-285 (1982) [Clary]. In this same

they did not inform one or both parents because of fear of retaliation or physical punishment.

Counselors and court appointed guardians, judges and other court personnel—all experienced in dealing with teenagers and their families—testified in *Hodgson* that minors are both truthful and accurate in their assessment and description of the family circumstances in which they live. There was overwhelming testimony that minors tend, if anything, to understate family problems and in particular, are reluctant to bring up matters of family violence and sexual abuse.[44]

Thus, instead of protecting minors, parental notification consent laws pressure minors toward involvement they *correctly* perceive to be harmful.

F. Compelled Parental Involvement Can Be Devastating To The Family And Is Especially Disastrous In Single Parent And Abusive Family Situations.

Experts with extensive clinical experience counselling families and knowledge of family communication patterns testified in *Hodgson* that while family relationships generally benefit from voluntary and open communication, the effect of compelling communication is unpredictable and frequently disastrous.[45] Neither accidental nor coerced communication of personal information is based upon trust or the voluntary desire to share or to know, which are the "hallmarks" of productive communication patterns in a normal family.[46]

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study, a third of the teenagers who had not notified their fathers did not do so because the father resided elsewhere.

44 *See e.g.* Hodg. Tr., Wendt at 41 (2/10/86); *id.* Swe tland at 763 (2/20/86); *id.* Judge Martin at 413-14 (2/13/86); *id.* Judge Oleisky at 26 (2/11/86); *id.* Judge Sweeney at 1038 (2/24/86); *id.* Widseth at 21, 24 (2/19/86); *id.* Smith at 33-34 (2/19/86).

45 *Hodgson* at 18a, 20a; Hodg. Tr., Dr. Benedek at 910-11, 992-93 (2/24/86); *id.* Dr. Melton at 1148-49 (2/25/86); *id.* Walker at 316 (2/13/86).

46 *Id.* Dr. Benedek at 930-33, 906 (2/24/86); *see generally* Curran, *Traits of a Healthy Family* (1983).

Under circumstances where trust is lacking or parents are unable to react supportively to the news of a daughter's pregnancy, maintaining secrecy might be the most mature response, as well as the one most likely to preserve and protect family relationships.[47] A decision not to reveal the fact of the pregnancy or abortion may avert "a real breakdown in the family relationship," a rupture or polarization of the marital relationship,[48] and may even avoid incidence of intra-familial violence. At 22a. The *Hodgson* court found, in light of the foregoing, that Minnesota's parental notification statute "fail[ed] to serve the State's asserted interest in fostering intra-family communication." At 37a.

The Illinois statute would be particularly harmful to single parent families since the Illinois statute requires notification of both biological parents, with no exception for situations where parents are separated but not divorced, parents were never married, or a parent has deserted the family. Whether or not both parents are present in the household, minors who have already notified one parent, face the dilemma of deciding whether to notify the other parent or to face the court procedure. This decision introduces a traumatic distraction to the voluntarily initiated daughter-parent communication.[49] Furthermore, the need to present proof of divorce can cause delay, and the statutory exception provides no guidance for how minors under joint custody arrangement should proceed.

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47 Following the notification that their daughter is pregnant, some parents refuse to speak to her for months. Hodg. Tr., Dr. Benedek at 906-07, 908-09 (2/24/86); *Hodgson*, Plaintiff's Exhibit 103 at 9, 12, 13 (deposition of Florence K.).

48 Notification has also resulted in marital discord and divorce. Hodg. Tr., Ring at 1663 (3/4/86); *id.* Dr. Butzer at 1354-56 (2/26/86).

49 One consequence of the two-parent requirement of the Minnesota statute is that some minors who would ordinarily have informed one parent were "dissuaded" from doing so, leading the court to conclude, "[T]he requirement that minors notify both biological parents actually reduces parent-child communication." At 23a.

The Minnesota court found, "[g]oing to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent." At 23a.[50] In fact, the court found, "no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification," rather the minor was further alienated from her non-custodial parent due to unrealized expectations of a renewed relationship. At 22a. Moreover, the court found that, "[t]he non-custodial parent often will reintegrate with the family in a disruptive manner." At 22a.

Dysfunctional families suffer particular harm from compelled notice. When notification is forced upon an abusive parent, such information may provoke intra-familial violence even where the parents are separated. At 22a. Notice to an abusive parent will be dangerous for the adolescent.[51] "[I]t would absolutely enrage [the abuser]. It would be much like showing a red cape to a bull."[52]

G. The Right Of Families To Be Free From Unwarranted Governmental Intrusion Does Not Give The State The Authority To Deny Minors Their Constitutional Right To Choose Abortion By Mandating Parental Involvement.

The constitutional rights of parents are not appropriately raised in this case. Appellants' Brief at 43-49. Parental rights may be asserted only against governmental intrusion. *See e.g.*

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50 Twenty to 25% of the minors utilizing the bypass procedure in Minnesota were accompanied by one parent, usually the mother, who knew and consented to the abortion procedure. At 22a.

51 Hodg. Tr., Dr. Walker at 310 (2/13/86).

52 *Id.* at 309; *see also id.* Judge Oleisky at 35 (2/11/86); *id.* Wendt at 89, 91 (2/11/86). The incidence of family violence is "substantially underestimate[d]" at two million affected families. At 27a. Moreover, when the family unit is dysfunctional, the period of acute stress or crisis generally accompanying a minor's disclosure of pregnancy or her decision to have an abortion is not the appropriate opportunity to attempt to establish healthy family communications. At 21a.

Meyer v. Nebraska, 262 U.S. 390, 401 (1923); *Moore v. City of East Cleveland*, 431 U.S. 494, 504 n.12, 507 (1977); *Doe v. Irwin*, 615 F.2d 1162 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980). This Court has recognized a due process interest of parents to be free from government intrusion in the process of bringing up a child, and providing for her education, religious or otherwise. *Wisconsin v. Yoder*, 406 U.S. 205, 231 (1972); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1924).[53]

This Court's recognition that minors, as well as adult women, are entitled to constitutional protections when making reproductive decisions is not a form of state intrusion.[54] Throughout a child's life, parents have ample opportunity to instill moral values, to provide sexual education and information on contraception, and to develop a rapport with their child. The fact that parent child communication about sex related matters may be poor, or nonexistent in some families, is not caused by government intrusion nor can it be remedied by criminal laws.

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53 Parental autonomy is protected so long as it operates to the benefit of the children. When the state determines that a particular practice, such as child labor, harms minors the state may encroach upon a family's integrity to prohibit certain conduct. *Yoder*, 406 U.S. at 233-34 (The State may require Amish parents to send children to school for basic skills education until age fourteen when children would not be harmed from having education provided only at home. "[T]he power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens"); *Prince v. Mass.*, 321 U.S. 158, 165 (1944) (Parents have the primary role of care and nurturance of their children and the State cannot enter the private realm of family life except when it must do so to protect "the welfare of children" and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens.")

54 *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976). ("Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant"); *Akron*, 462 U.S. at 440 (A state may not make a "blanket determination" that *all* minors are too immature or that it is against the best interests of *all* minors to obtain a confidential abortion).

II. THE UNCONSTITUTIONALITY OF THE ILLINOIS MANDATORY PARENTAL NOTICE AND WAITING PERIOD IS NOT CURED BY THE JUDICIAL BYPASS ALTERNATIVE.

The twenty-four hour waiting period in the Illinois Parental Notification Act imposes a burden on minors which serves no legitimate purpose.[55] *Akron*, 462 U.S. at 450. The Illinois statutory waiting period does not begin to run until after the woman has decided to have an abortion and after she has rendered her informed consent to the procedure. When a woman has given "her written and informed consent . . . a State may not demand that she delay the effectuation of that decision." *Akron*, 462 U.S. at 451.

The delays imposed by the Illinois statute would be far greater than those imposed by the *Akron* statute, *Akron* at 450, because the period does not begin to run until after both parents have signed statements acknowledging notification of their daughter's decision to have an abortion.[56] As experienced in Minnesota, it can often take days if not weeks to locate absent parents.[57]

Like the *Akron* waiting period the Illinois "inflexible" waiting period has "no medical basis" and would not assure that "the abortion procedure would be performed more safely."

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55 The Minnesota Statute § 144.343(2) imposed a forty eight hour delay after the minor had rendered her informed consent and after both of her parents had been notified. Despite its factual conclusion that the notice statute served no purpose, however, the Minnesota court felt bound by *H.L. v. Matheson*, 450 U.S. 398 (1981) (*Matheson*), and held that parental notice "would be an empty formalism" if a mandatory wait were not allowed. At 28a.

56 In Duluth Minnesota, where *amicus* Duluth Women's Center is the only provider serving 28 counties, and the clinic performs abortions only 2 days a week, the waiting period caused as much as one week delay. Hodg. Tr., Welsh at 137 (2/3/86).

57 One minor had a two-week delay because her natural father refused to acknowledge paternity. Hodg. Tr., Dr. Hodgson at 132 (7/11/85).

Akron, 462 U.S. at 450.[58] Furthermore, the facts establish that mandatory parental involvement, with or without a waiting period, does not further family integrity or family communication. *See infra*. Sections I-E, I-F.

Appellants claim that the significant burdens imposed by forced delay can be ignored because of the judicial bypass alternative. Far from alleviating these burdens, the judicial bypass procedures instead creates its own set of pointless obstacles. Experience establishes that the judicial alternative does *not* allow minors to "bypass" the delay, the increased expense, the trauma, the loss of anonymity, and the health risks created by mandatory parental involvement laws and waiting periods.

A. Going To Court Causes Delay, Forcing Minors To Obtain Riskier, More Costly Abortions.

The National Academy of Sciences recently concluded that a judicial bypass procedure "is a *de facto* waiting period."[59] The bypass causes a delay even greater than the one imposed by the waiting period. The *Hodgson* court concluded that the judicial bypass was working as efficiently as it could. At 9a. Yet this "efficient" system was one in which there was an average of a two or three day delay in obtaining a court hearing on a minor's petition *after* she managed to contact the court. "Moreover, this delay sometimes combines with scheduling difficulties . . . to produce a longer delay . . .", "of a week or more," at 9a, 11a, and delays up to three weeks occurred to some *amici* minors.[60]

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58 In Minnesota, doctors and counselors testified they never received medical information from parents subsequent to mailed notice and in any event always received more accurate information by taking minor's medical history out of parents' presence. Hodg. Tr., Dr. Hodgson at 27 (7/11/85); *id.* Wendt at 85 (3/25/86).

59 *Risking*, *supra* note 12 at 195.

60 The Massachusetts consent statute caused an average delay of 4.2 days between the time that a minor first contacted a lawyer and the court hearing to consider her petition for a confidential abortion. Pliner at 52a.

The Minnesota court concluded that such delays "do not reflect a systemic failure" in the bypass procedure, but are "unavoidable" aspects of a judicial bypass option. At 9a.

Delay creates health risks for minors. In Minnesota, a delay of one or two weeks, in many cases, meant the difference between a first trimester and a second trimester abortion.[61] Because second trimester abortions are more costly[62] and because fewer medical facilities perform them, minors who were forced into the second trimester of pregnancy had to travel greater distances, and raise more money, which in turn caused even further delays.

B. The Court Process Interferes With The Provision Of Quality Medical Care.

The court alternative creates burdens distinct from those caused by the arbitrary waiting period. The time consuming and traumatic court process prevents physicians and counselors from providing optimal medical care. For example, insertion of laminaria, a technique which takes six hours, could not be used with court minors if the abortion had to be completed in one day.[63]

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61 The percentage of minors who obtained second trimester abortions increased by 26.5% during the operation of the notification law. *Hodgson* Plaintiffs' Exhibit 122.

62 The *Hodgson* court found that when a minor was delayed to the 13th week of gestation, the procedure cost 22% more than if she had received an abortion prior to her twelfth week. This figure does not include the cost of additional travel, lodging or food costs that would necessarily be incurred. At 7a. National statistics are comparable. Henshaw, *Free-Standing Abortion Clinics: Services, Structure, Fees,* 14 Fam. Plan. Persp., 248-256 (1982).

63 Plaintiff Dr. Hodgson testified that although laminaria, a technique to dilate the cervix is usually used only for second trimester patients it was best medical practice to insert laminaria even in the first trimester for teenagers with immature cervixes. This could not be done for her teenage patients in Duluth who travel far to get to court, do not get through the court procedure until midafternoon, and then must have their abortion and return home the same day. Dr. Hodgson was forced to choose between not using laminaria and not doing the procedure at all. Hodg. Tr., Dr. Hodgson at 74, 75 (7/11/85) at 14-15 (7/12/85). *See also*, *id.*, Dr. Benedict at 103 (7/12/85).

In both Minnesota and Massachusetts, counselors had to spend their time preparing minors for the often traumatic court appearance, and reassuring and calming them afterward. This detracted from the amount of time available to educate the minors about the abortion procedure and changed the focus from the minor herself to the court process.[64]

C. The Court Process Compromises Minors' Right To Anonymity And Interferes With Their Psychological Development.

Experience under the judicial bypass statutes demonstrates that a minor's right to anonymity cannot be preserved, even with the best efforts of a judicial system.

The right to privacy "includes independence in making certain kinds of important decisions." *Akron*, 462 U.S. at 427 n.10 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). "The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity." *Thornburgh*, ___ U.S. ___, 90 L.Ed at 797 (1986).

This Court has held that judicial bypass procedures must scrupulously safeguard minors' anonymity. *Ashcroft*, 462 U.S. at 491 n.16, (*citing Bellotti II*, 443 U.S. at 644). In reality, however, no judicial bypass system has succeeded in consistently safeguarding a minor's right to confidentiality and anonymity. Most minors who went to court in Minnesota faced as many as twenty-three strangers who knew their first name, and that they were pregnant and that they were seeking a court order.[65]

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64 Hodg. Tr., Wendt at 58-61 (2/10/86); *id.* Welsh at 344 (2/13/86).

65 These strangers included other teenagers waiting for a bypass hearing, other parents, boyfriends of other minors, secretaries, receptionists, court clerks, court reporters, the guardian *ad litem*, public defender, judge and the judge's law clerk. Hodg. Tr., Daly at 254 (2/12/86); *id.*, Judge Oleisky at 19 (2/11/86); *id.* Honkala at 523, 526 (2/18/86); *id.* Widseth at 35-38 (2/19/86).

Protecting anonymity is especially difficult in small communities where people know one another.[66] On numerous occasions, minors in Minnesota encountered court employees or even judges whom they knew. Minors also encountered friends and acquaintances in court.[67] On one occasion, a young woman encountered her entire school class on a field trip to the court while she was waiting to see a judge.[68]

In *Thornburgh*, this Court struck down an abortion reporting statute despite the apparent guarantee of name anonymity because women would "necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly." ___ U.S. ___, 90 L. Ed. at 797. Certainly the requirement of a personal appearance in a public courtroom creates a much greater likelihood of disclosure than an anonymous reporting statute. Moreover, compelled public exposure of a minor's abortion decision causes her damage not necessarily suffered by adult women.

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66 Public defenders in Duluth, Minnesota represented minors who were the children of their co-workers, and in one case a public defender represented a judge's niece. The niece waited in the bathroom of the courthouse until her hearing so she would not be recognized. Hodg. Tr., Sweetland at 767 (2/20/86).

67 In Minnesota, sometimes several minors from the same school were scheduled for the same court date and waited together to see the judge. Hodg. Tr., Honkala at 543 (2/18/86). One minor's father was a well-known political figure in the city where the teenager went to court. The judge who heard her petition recognized her immediately and told her so. Deposition in *Hodgson*, Sylvia P., (12/16/83) Plaintiffs' Exhibit 94 at 20. Another minor entered the judge's chambers and recognized the court reporter as her parents' neighbor. Deposition in *Hodgson*, Natalie C., Plaintiffs' Exhibit 100 at 11 (1/1/84).

All those involved with getting the minors through the system in Minnesota, including judges themselves, remarked on how easily recognizable the minors were: "[T]hey stand out like a sore thumb from the various other people sitting there." Hodg. Tr., Daly at 254 (2/12/86). Indeed, on several occasions, a counselor accompanying the minors to court saw the building receptionist tell strangers why the group of nervous young women were waiting together as if the receptionist were pointing out a tourist attraction. *Id.*, Honkala at 523 (2/18/86).

68 Hodg. Tr., Honkala at 525-526, 543 (2/18/86).

Adolescent development requires the achievement of separation from parents and the development of an individual identity and value system.[69] Critical to this achievement is learning to make decisions independently, which in turn requires control over one's own decision-making.[70] Withdrawal of this control commonly causes reactions ranging from rebellion to depression, hypertension, or regression.[71] Privacy is critical to the adolescent's process of differentiating and integrating in relation to society as a whole.[72] The *Hodgson* court found as fact that "the desire on the part of minors to retain their privacy with respect to the abortion decision is, at least in part, a result of the maturation process." At 33a.

D. Judicial Bypass Is A Traumatic, Destructive Experience For Many Minors.

The judicial bypass procedures in both Massachusetts and Minnesota have proven to be emotionally and physically traumatic to the minors who use them. *Amici* testified in the *Hodgson* trial that going to court was more frightening than the abortion itself.[73]

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69 Blos, *The Second Individuation Process of Adolescence*, in 22 The Psychoanalytic Study of the Child (1967).

70 This control leads to psychological achievement and motivation, high self-esteem and behavioral responsibility. *See generally Choice and Perceived Control* (Perlmuter & Monty eds. 1979); Melton, *Decision Making by Children: Psychological Risks and Benefits* in *Children's Competence to Consent* (Melton, Koocher, Saks, eds. 1983).

71 *See, e.g.*, Brehm, *A Theory of Psychological Reactance* (1966); Seligman, *Helplessness: On Depression, Development, and Death* (1975); Bandura, *Self-Efficacy Mechanism in Human Agency*, 37 Am. Psychologist 122 (1982).

72 Melton, *Minors and Privacy*, 62 Neb. L. Rev. 455, 487-88 (1983); Wolfe, *Childhood and Privacy in Children and the Environment* at 125 (1978).

73 Hodg. Tr., Smith at 35-36 (2/19/86).

Massachusetts Judge Paul Garrity concluded that going to court was "absolutely" traumatic for minors. "You know, it was just—it was just another thing at a very, very difficult time in their lives." At 17a.[74]

The *Hodgson* court found:

> The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. . . .
>
> Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.

At 11-12a.

The court procedure was so nerve-wracking for some of the young women that it made them physically ill. Some minors vomitted in court; others left the court "wringing wet with perspiration," and it was necessary to give some of them a sedative.[75] The evidence gathered in the *Hodgson* case and in Massachusetts proves that the court bypass procedure can never provide a non-burdensome viable alternative for minors who cannot tell either or both biological parents, about their pregnancy.

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74 *See also*, Donovan, *Your Parents Or the Judge: Massachusetts' New Abortion Consent Law* 13 Fam. Plan. Persp. 224-228 (1981) [Donovan].

75 *Hodgson* Plaintiffs' Exhibit 92, Deposition of Dr. Hodgson at 23 (7/11/85).

E. Bypass Procedures Do Not Serve Any Legitimate Purpose Whatsoever.

The *Hodgson* court found that the court alternative does not serve any legitimate purpose.

None of the six Minnesota state court judges who together had adjudicated over ninety percent of the parental notification petitions since August, 1981 identified any positive effect of the bypass procedure or of the law generally.[76]

1. The Court Bypass Procedure Does Not Weed Out Immature And Non Best Interest Minors From Mature Minors.

The justification for all "notice and consent plus bypass" schemes has been to protect "*immature*" minors. *Bellotti II*, 443 U.S. 622, 634-639; *Akron*, 462 U.S. 416, 439. The bypass scheme in operation, however, fails utterly to detect, much less benefit, such minors if any actually exist.

In both Minnesota and Massachusetts the impact of court bypass procedures has been disproportionately, if not entirely, on mature minors and on minors whose best interest would be served by allowing abortion access without parental involvement. Nearly all minors' petitions filed in both states were granted because the minors fit those categories.[77]

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76 Hodg. Tr., Judge Oleisky at 39 (2/11/86); *id.* Judge Albrecht at 415 (2/19/86); *id.* Judge Sweeney at 1035-1037, 1040 (2/24/86); *id.*; Judge Riley at 2009 (3/10/86); *id.* Judge Peterson at 1305 (2/26/86). Judge Garrity stated that the Massachusetts law "just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion." At 22a. Massachusetts Superior Court Chief Judge Thomas Morse Jr. concurred, "the law puts judges in the ridiculous position of being rubber stamps." N. King, *Law to Limit Minors' Abortions Unworkable, State Judges Say,* Boston Globe, 3/31/82; *see e.g.*, Zobel, J. *Should Teenagers Have Abortions? Don't Ask the Judge.* The Patriot Ledger, at 19 10/24/84. Four years later Chief Judge Morse explained that "The process is cumbersome. But I guess my main complaint about the system is that it doesn't seem to be working well for the benefit of [the minors] who are coming in seeking the remedy." D. McManus, *May I Judge*, Boston Globe Magazine at 14 (6/15/86) [McManus].

77 In Massachussetts, of over three thousand bypass petitions filed by minors during the five years of the parental consent statute's operation, only

These uniform findings of maturity prove that the bypass procedure is meaningless. "A test that does not discriminate among examinees is, for all intents and purposes, no test at all." *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431-4 (1971) (tests which "operate as built-in headwinds" to the exercise of rights are unconstitutional when they bear no demonstrable relationship to their purpose).

In Minnesota, the court found:

> Minnesota courts have denied only an infinitesimal proportion of the petitions brought since 1981. This fact indicates that in Minnesota immature, non-best interest minors rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents, obtain an abortion outside Minnesota, or carry the pregnancy to term.

At 19a. Moreover, the court concluded,

> [A] regulation that affects only minors who have elected to terminate their pregnancies and to do so in privacy tends inevitably to reach only mature minors and immature minors driven to this choice by their own best interests. Such a regulation will fail to further the State's interest in protecting immature, non-best interest minors.

At 19a-20a.

2. The Standards For The Judicial Determination Of A Minor's Maturity Are Inevitably Arbitrary And Depend More On The Judge Than On The Minor.

The National Academy of Sciences report noted the absence of research on whether "maturity" can be reliably assessed,

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eleven were turned down. Ten of those denials were overturned on appeal within seventy-two hours. In the eleventh case, the minor decided to go out of state for her abortion. McManus, *supra* note 76. In Minnesota, 3,573 bypass petitions were filed over 5 years. Of those, six petitions were withdrawn before decision, 3,558 were granted and only nine were denied, all for anomalous reasons, such as the minor wanting the denial so her boyfriend would marry her. At 15a.

and concluded "such assessments run the risk of being inconsistently interpreted and applied, as well as being inaccurate. Along with other legal scholars and professional psychologists . . . the panel questions whether a 'mature minor' standard can be effectively implemented."[78]

Minnesota judges had no consensus as to the definition of "mature."[79] In Massachusetts, the State Supreme Judicial Court issued procedural guidelines in June, 1981 setting forth the factors that judges should use as the basis for maturity determinations.[80] However, the guidelines do not specify what weight to give each variable and effectively leaves judges to apply their own definitions of maturity.[81]

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78 *Risking, supra* note 12, at 277.

79 One judge relied in part on whether the minor had considered all the available options to abortion and her future plans and goals. Hodg. Tr., Judge Oleisky at 21, 22 (2/11/86). Another judge relied solely on a minor's intelligence in determining her maturity. *Id.* Judge Sweeney at 1032 (2/24/86). Another judge determined a minor's maturity by considering the level of strain on her; he admitted, however, that because the law did not define maturity he was left to make a subjective judgment of a minor's maturity predicated on her ability to reason and articulate. *Id.* Judge Martin at 408 (2/13/86). One judge who adjudicated over 200 cases found all 13, 14, 15 and most 16 year-olds "immature" but "best interests," and all 17 year olds mature. *Id.* Judge Peterson at 1285, 1293-94 (2/26/86).

80 Liacos, J. (1981). Supreme Judicial court guidelines for M.G.L.C. 112 § 125 hearings. Memorandum Supplementing Superior Court Order No. 12-80. (These guidelines state that a judge may appropriately inquire into such areas as the minor's age, schooling and work experience, the abortion counseling she has received, and the nature of her decision, i.e., whether the decision was voluntary. Further, judges may inquire into the minor's understanding of the abortion procedure).

81 Despite the formidable task of making a determination of an adolescent's maturity, more than 83.5% of the hearings in Massachusetts lasted fifteen minutes or less. *Pliner* at 51a.

F. Generally, The Court Bypass Is An Option Only For Older, Resourceful Minors.

In practice, court bypass systems are not available to many teenagers.[82] Eighty-nine percent of all the minors who went to court in Minnesota were either sixteen or seventeen years old. Moreover, "they were typically middle to upper-middle-class kids, . . . the vast majority of them in school [with] . . . plans for the future. Typically, they were white."[83]

Minors from abusive, dysfunctional families are the most likely to find the bypass option out of reach. An expert on such families, Dr. Leonore Walker, testified that it would be exceptionally difficult for these minors to choose and carry out the bypass procedure because, ". . . the rules of those families are secrecy . . . Going to court would be an exposure of a risk [of more abuse] and it would be very difficult for a minor to do that."[84]

Fear, inaccessiblity, and lack of resources placed the judicial bypass procedure in Minnesota out of the reach of "some mature minors and some minors in whose best interests it is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term." At 11a-12a, 19a.[85]

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82 At 11a, 18-19a.

83 Hodg. Tr., Daly at 263 (2/12/86). The state court judges concurred in this impression of the minors who were able to use the court bypass procedure. Hodg. Tr., Judge Albrecht at 9 (2/19/86); *id.*, Judge Oleisky at 18 (2/11/86) ("I can always recognize the children who are going to have an abortion, they look different than a lot of the kids coming into court on delinquency"); *id.*, Judge Peterson at 1305 (2/26/86).

84 Hodg. Tr., Walker at 313, 329 (2/1/86).

85 The notification and court appearances are both so forbidding that in Massachusetts, minors who have the necessary resources avoid that state's parental involvement law by travelling out-of-state. The Massachussetts consent law causes one in three minor abortion patients to travel across state lines. Cartoof, *supra* note 5, at 399.

In Minnesota, this was evidenced by a significant increase in births to teens resulting from the law. At 14a.[86]

This Court believed that a court bypass would provide a real option for minors needing confidential abortions. However, this option is unavailable to poor minors and the minors who are the least resourceful and most emotionally troubled. Serious rethinking must be done about the constitutionality of a scheme that undermines rather than protects constitutional liberties.

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86 In Minnesota, the birthrate of minors in Minneapolis, from 1980 to 1984, increased by 38.4%. Dr. Ehlinger, the Director of Personal Health Services for the Minneapolis Department of Health identified the implementation of the notification law as the most important factor causing this increase. Hodg. Tr., Ehlinger at 2054 (3/10/86). At the same time the rate of minors' abortions in Minnesota dropped significantly. *Id.*, at 2022-2025.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal and deny certiorari. In the alternative, this Court should affirm the judgment of the court of appeals from which the appeal is taken.

Respectfully submitted,

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February 12, 1987

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87 Attorneys for the *Amici* gratefully acknowledge Suzanne Sangree, Reproductive Freedom Project Fellow (1986-1987), for her extensive work in preparing this brief. The attorneys would also like to thank Robyn Blumner for her assistance.

APPENDICES

APPENDIX A

United States District Court

DISTRICT OF MINNESOTA

THIRD DIVISION

3-81 CIV 538

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; MICHELLE ROE, ALICE ROE, DIANA ROE, NADINE T., JANET T., and ELLEN Z., individually and on behalf of all other persons similarly situated; LAUREN Z.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation, MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Plaintiffs,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMERICAN CIVIL LIBERTIES UNION FOUNDATION by JANET BENSHOOF, Esq., RACHAEL PINE, Esq. and SUZANNE LYNN, Esq. of New York, New York, appeared on behalf of plaintiffs.

MASLON, EDELMAN, BORMAN & BRAND by WILLIAM PENTELOVITCH, Esq. of Minneapolis, Minnesota, appeared on behalf of plaintiff Planned Parenthood of Minnesota.

HUBERT H. HUMPHREY, III, Attorney General of the State of Minnesota by JOHN GALUS, Special Assistant Attorney General, and PETER M. ACKERBERG, Special Assistant Attorney General, St. Paul, Minnesota, appeared on behalf of defendants.

The above-entitled matter came before the court for trial from February 10, 1986, until March 13, 1986, and for argument on June 11, 1986. Having considered the evidence and being fully advised in the premises, the court makes the following:

FINDINGS OF FACT

I. Introduction

1. Plaintiffs Jane Hodgson, M.D., and Arthur Horowitz, M.D., are licensed physicians engaged in the practice of obstetrics and gynecology, including the performing of abortions, in Minnesota.

2. Plaintiff Meadowbrook Women's Clinic, P.A., provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18 at a medical facility located in St. Louis Park, Minnesota.

3. Plaintiff Planned Parenthood of Minnesota provides birth control, abortions and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in St. Paul, Minnesota.

4. Plaintiff Midwest Health Center for Women provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Minneapolis, Minnesota.

5. Plaintiff Women's Health Center of Duluth, P.A., provides birth control services, abortions, and related medical services to its patients, including unemancipated minor women under the age of 18, at a clinic located in Duluth, Minnesota.

6. Plaintiff Alice Roe was a 16-year-old unemancipated minor and seven weeks pregnant at the commencement of this action. Alice Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

7. Plaintiff Michelle Roe was a 15-year-old unemancipated minor who was pregnant at the commencement of this action. Michelle Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

8. Diane Roe was a 16-year-old unemancipated minor and eight weeks pregnant at the commencement of this action. Diane Roe asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

9. Plaintiff Nadine T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Nadine T. asserts that she was at that time mature and that notification of her parents of her desire to have an abortion would not have been in her best interests.

10. Plaintiff Janet T. was a 16-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Janet T. asserts that she was at that time mature and that notification of her father of her desire to have an abortion would have not been in her best interests.

11. Ellen Z. was a 17-year-old unemancipated minor and pregnant as of the time of the filing of the amended complaint in this action. Ellen Z. asserts that she was then mature and that notification of her father of her desire to have an abortion would not have been in her best interests.

12. Plaintiffs Alice Roe, Michelle Roe, Diane Roe, Nadine T., Janet T., and Ellen Z. represent a class composed of pregnant minors who assert that they are mature and that notification of one or both of their parents would not be in their best interests.

13. Lauren Z. is the mother of plaintiff Ellen Z. Lauren Z. asserts that notification of Ellen Z.'s father of Ellen Z's desire to have an abortion would not have been in Ellen Z.'s best interests.

14. Defendants are the State of Minnesota, its Governor and its Attorney General.

15. In 1981, the Legislature of the State of Minnesota enacted Minn. Laws 1981, ch. 228, codified as Minn. Stat. § 144.343 (2)-(7). The statute was to become effective August 1, 1981.

16. Subdivision 2 of the statute generally requires physicians or their agents to attempt with reasonable diligence to notify the parents of an unemancipated minor under the age of 18 at least 48 hours before performing an abortion. Subdivision 3 defines "parent" as both parents if both are living, one parent if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one. Subdivision 4 of the statute provides that the statutory notice requirement does not apply when the parents have consented to the abortion, when prompt action is needed to preserve the life of the minor, or when the minor reports that she is a victim of sexual or physical abuse or neglect as defined in Minn. Stat. § 626.556. Subdivision 5 subjects anyone performing an abortion in violation of Minn. Stat. § 144.343 (2)-(7) to criminal penalties and civil liability.

17. Subdivision 6 of the statute provides, in the alternative, that if subdivision 2 is ever enjoined by judicial order, then the same notice requirement shall be effective together with an optional procedure whereby an unemancipated minor may obtain a court order permitting an abortion without notice to

her parents upon a showing that she is mature and capable of giving informed consent to an abortion or, if she is not mature, that an abortion without notice to her parents nevertheless would be in her best interests.

18. In their amended complaints, plaintiffs seek a declaratory judgment that Minn. Stat. § 144.343 (2)-(7) violates the constitutions of the United States and the State of Minnesota and seek a permanent injunction against its enforcement. More particularly, plaintiffs claim that the statute violates their due process rights, both on its face and as applied; that the statute violates the equal protection clause; and that the statute violates the due process, privacy and equal protection provisions of Article 1 of the Minnesota Constitution and also constitutes the delegation of administrative power to Minnesota state courts in violation of Article 3 of the Minnesota Constitution.

19. Before the statute took effect on August 1, 1981, plaintiffs sought a temporary restraining order and preliminary injunction against the statute.

20. On July 31, 1981, the court temporarily restrained enforcement of subdivision 2 of the statute, but denied plaintiffs' motion for an order temporarily restraining enforcement of subdivision 6. On March 22, 1982, the court preliminarily enjoined subdivision 2 but denied a preliminary injunction of subdivision 6. By virtue of these two rulings, the parental notification requirement and the judicial bypass option of subdivision 6 went into effect on August 1, 1981, and have remained in effect since that date.

21. By memorandum order of January 23, 1985, the court granted in part and denied in part defendants' motion for partial summary judgment as to all of plaintiffs' claims concerning the judicial bypass procedure of subdivision 6. Specifically, the court granted partial summary judgment for defendants by dismissing all of plaintiffs' state constitutional claims on jurisdictional grounds and by ruling that, on its face, the judicial bypass procedure in subdivision 6 does not violate the constitutional equal protection and due process rights of

pregnant minors. The court concluded, however, that plaintiffs should have the opportunity of a trial to prove their allegations that subdivision 6 is being applied unconstitutionally.

II. Availability of Abortion Services In the State of Minnesota

22. Abortion services are less accessible in Minnesota than in the country as a whole. In Minnesota, 94% of the counties, or 82 out of 87 counties, have no readily available abortion provider. In 1982, 44% of women in Minnesota ages 15-44 lived in a county with an abortion provider as compared to 72% of the same group in the country as a whole.

23. Access to information about abortion services in outstate Minnesota is comparatively limited. Many second trimester patients come from counties with no abortion providers and thus with no media advertising or listing in telephone books for abortion services.

24. Abortions are performed in only four public and nine private hospitals in Minnesota, and then only if a staff doctor requests it. There are only two hospitals where a patient can walk in and obtain an abortion: Hennepin County Medical Center and St. Paul-Ramsey. Virtually all of Minnesota's abortion providers are located in the two major metropolitan areas of the state: Duluth and Minneapolis-St. Paul. Many women have to travel long distances to obtain abortion services.

25. The transportation problems facing women seeking abortion in Minnesota are illustrated by the experiences of those attending the Women's Health Center Clinic in Duluth. The Health Center serves women from 24 counties in Minnesota, 14 counties in Wisconsin, 4 counties in Michigan and the Canadian Province of Ontario. Some of the women served by the Health Center drive six to seven hours to get to the clinic. Airline flights are not available from some areas. Bus service from some areas is infrequent, requiring some women to spend the night in Duluth.

Having to travel long distances creates barriers to obtaining services. These barriers include increased cost, particularly if lodging is required; delayed pregnancy diagnosis and delayed treatment of post-abortion complications; jeopardized privacy of women away from home; and more hazardous travel during winter.

Nearly 30% of all abortions performed in Minnesota in 1982 were obtained by women who lived outside the Twin Cities metropolitan area, an increase of 20% since 1976. The farther a women [sic] has to travel to obtain an abortion, the less likely she is to obtain one.

26. Women of all ages in Minnesota have abortions later in their pregnancies than in the United States as a whole. In 1981, 9.5% of women having abortions in the United States had second trimester abortions, while 13.5% of all women obtaining abortions in Minnesota did so in their second trimester. In 1982, 15% of women from outside the metropolitan area who had abortions did so during the second trimester as compared with only 10% of metro area women.

27. The cost of an abortion increases with gestational age because the procedure becomes more difficult and requires more skill on the part of the doctor. The Meadowbrook Clinic has the following fee schedule: under 12 weeks gestation, $225; 12-14 weeks, $275; 14-16 weeks, $395; 16-18 weeks, $450; 18-19 weeks, $550; and 19-21 weeks, $650. After 21 weeks, Meadowbrook refers patients to St. Paul-Ramsey Hospital where a later abortion (22 weeks) costs $1600-1800, or to Wichita, Kansas, where a late abortion (up to 24 weeks) costs $2000 cash. None of these fees includes the cost of transportation or lodging. Minnesota will fund abortions for indigent women only if the pregnancy is the result of rape or incest, or if continuing the pregnancy would endanger the life of the woman.

28. Unfavorable publicity surrounding the abortion procedures and delivery of services has dissuaded some physicians from performing abortions. For example, the Women's Health Center in Duluth has been unable to contract local physicians

to perform abortions. The Center has had to import physicians from small communities some distance from Duluth. Physicians are also concerned about the bombings of clinics and doctors' offices. Consequently, some physicians refer their abortion patients elsewhere.

III. Application of Minn. Stat. § 144.343 in Minnesota, August 1, 1981, to March 13, 1986.

A. Compliance with *Bellotti v. Baird*, 432 U.S. 622 (1979)

1. *Legal Standard*

29. Minnesota Statutes § 144.343 (6) provides:

> (c)(i) If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

30. With the exception of a hearing occurring shortly after enactment of § 144.343, judges in Minnesota have faithfully applied the standards set forth in subdivision 6. Those judges who consider themselves unable to faithfully apply this standard have consistently refused to hear bypass petitions.

31. Courts hearing bypass petitions regularly appoint guardians ad litem and provide appointed counsel to assist minors participating in bypass proceedings.

32. Judges, public defenders, and guardians ad litem do not adhere to a single interpretation of either the "maturity" or "best interests" standard. However, the variation in interpretation of these standards does not exceed that typical of verbally expressed legal standards. Moreover, these differences of interpretation do not produce different results in actual bypass proceedings.

2. *Expedition*

33. Courts in Hennepin, Ramsey, and St. Louis Counties schedule bypass hearings on a regular basis. When necessitated by pressing need, these courts will hear a number of petitions greater than that normally scheduled for a single day. These courts also have in place procedures for hearing bypass petitions outside of normal business hours on an emergency basis.

34. Two or three days commonly elapse between a minor's first contact with the court and the hearing on her petition. A delay of this duration creates an increased medical risk to an abortion patient, albeit small in magnitude, and may increase the emotional tension attendant upon the judicial proceeding. Moreover, this delay sometimes combines with scheduling difficulties of a minor or her clinic to produce a longer delay. Thus, the delay in the judicial bypass system as executed by courts in the metropolitan counties is burdensome to minor petitioners. However, this delay and its resultant burden are unavoidable and do not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner.

35. Although the court systems of the non-metropolitan areas have had less frequent occasion to apply the judicial bypass procedures than Hennepin, Ramsey, and St. Louis County courts, these court systems are acquainted with the statute and have applied it conscientiously when called upon to do so.

36. Courts of non-metropolitan counties called upon to hear bypass petitions generally have complied with their statutory obigation to advise petitioners of their right to appointed counsel and to provide such counsel upon request. These courts also generally have appointed guardians ad litem to assist petitioners.

37. Despite conscientious efforts to provide an expeditious court bypass option in non-metropolitan areas, a number of counties are not served by a judge who is willing to hear bypass petitions. A minor in one of these counties must travel to another county, most commonly a metropolitan county, to obtain an expeditious hearing of her petition. Although burdensome, this necessity also does not reflect a systemic failure to provide a judicial bypass option in the most expeditious practicable manner.

38. On August 13, 1981, the Supreme Court of Minnesota issued an order directing that all petitions under subdivision 6 should initially be filed in and considered by the county courts throughout the state or, in the cases of Hennepin and Ramsey Counties, in the juvenile division of the district court of those two counties. In the same order, the Minnesota Supreme Court directed that all appeals should be on the record to a judge of the district court, including the district courts of Hennepin and Ramsey Counties.

39. In an amended and supplemental order effective July 1, 1984, the Supreme Court of Minnesota provided that in a unified judicial district, an order denying a petition pursuant to the judicial bypass procedure shall be appealable on the record to two district court judges and if there be a division between those judges, the order denying the petition should stand.

40. No minor has been unable to obtain an expeditious appeal of an order denying her bypass petition.

3. *Anonymity*

41. Judges, public defenders, guardians ad litem, and court personnel involved in bypass proceedings are aware that Minn.

Stat. § 144.343 (6) requires that bypass proceedings be kept strictly confidential. Those involved in the proceedings take steps to insure confidentiality, including destroying interview notes, holding hearings in judges' chambers rather than in open court, and referring to petitioners by first name only. In addition, public defenders and courts have departed from normal routines when adhering to the routine would have threatened confidentiality.

42. The record discloses that the confidentiality of minors electing the judicial bypass option has been breached only in a small number of isolated cases.

B. Burdens Imposed by Minn. Stat. § 144.343 (2)-(7)

1. *Judicial Bypass Procedure*

43. As discussed above, scheduling practices in Minnesota courts typically require minors to wait two or three days between their first contact with the court and the hearing on their petitions. This delay may combine with other factors to result in a delay of a week or more. A delay of this magnitude increases the medical risk associated with the abortion procedure to a statistically significant degree. Even a shorter delay may push the minor into the second trimester, when the abortion procedure entails significantly greater costs, inconvenience, and medical risk.

44. The experience of going to court for a judicial authorization produces fear and tension in many minors. Minors are apprehensive about the prospect of facing an authority figure who holds in his hands the power to veto their decision to proceed without notifying one or both parents. Many minors are angry and resentful at being required to justify their decision before complete strangers. Despite the confidentiality of the proceeding, many minors resent having to reveal intimate details of their personal and family lives to these strangers. Finally, minors are left feeling guilty and ashamed about their lifestyle and their decision to terminate their pregnancy. Some mature minors and some minors in whose best interests it

is to proceed without notifying their parents are so daunted by the judicial proceeding that they forego the bypass option and either notify their parents or carry to term.

Some minors are so upset by the bypass proceeding that they consider it more difficult than the medical procedure itself. Indeed, the anxiety resulting from the bypass proceeding may linger until the time of the medical procedure and thus render the latter more difficult than necessary.

2. *Two Parent Notice Requirement*

45. A minor who chooses not to go to court to avoid notifying her parents must notify both parents, if they are living, unless the second one cannot be located through reasonably diligent effort. The statute makes no exception for a non-custodial parent who is divorced or separated from the custodial parent, or for a parent who never married the custodial parent. No exception is made in the case of a parent, custodial or not, whom the minor considers likely to react abusively to notification, unless the minor is willing to declare that she is a victim of sexual or physical abuse.

46. If a minor declares that she is the victim of sexual or physical abuse, Minn. Stat. § 144.343 (4)(c) obligates the recipient of this information to report it to the local welfare agency, police department, or the county sheriff pursuant to Minn. Stat. § 626.566 (3). This obligation binds counselors and physicians at abortion clinics. The welfare agency must report the information to the law enforcement agency, and vice versa. Minn. Stat. § 626.566 (3).

47. Minors who are victims of sexual or physical abuse often are reluctant to reveal the existence of the abuse to those outside the home. More importantly, notification to government authorities creates a substantial risk that the confidentiality of the minor's decision to terminate her pregnancy will be lost. Thus, few minors choose to declare they are victims of sexual or physical abuse despite the prevalence of such abuse in Minnesota, as elsewhere.

48. In practice, the requirement that the minor notify both parents, if living, affects many minors in single parent homes who have voluntarily notified the custodial parent. No exception is made, for example, in the case of a non-custodial parent who for years has exhibited no interest in the minor's development. No exception is made for parents likely to react with psychological, sexual or physical violence toward either the minor or the custodial parent. Minors in such circumstances must notify the non-custodial parent, or else go to court for authorization to proceed without notifying the non-custodial parent. Notification of an abusive or even a disinterested absent parent may reintroduce that parent's disruptive or unhelpful participation into the family at a time of acute stress. Alternatively, going to court to seek authorization introduces a traumatic distraction into the family relationship at a stressful juncture. The emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

49. The two parent notification requirement also affects minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the notified parent. Here, too, the minor must choose either to notify the second parent or to endure the court bypass procedure. Once again, the emotional trauma attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

50. Instances, such as those described above, in which the requirement that the minor notify both parents of her decision interferes with and burdens parent-child communication voluntarily initiated by the minor are not uncommon. Approximately 20-25% of minors who go to court for authorization are accompanied by one parent or indicate that they have already consulted with one parent.

3. *Forty-Eight Hour Waiting Period*

51. Minors who elect to notify one or both parents by written notice, including those whose parents refuse to sign acknowledgment forms despite having been told of their daughters' decision, must wait until 48 hours after actual or constructive delivery of written notice. Constructive delivery of mailed notice occurs at noon on the regular mail delivery day following mailing. Thus, Minn. Stat. § 144.343 delays effectuation of a minor's decision to terminate her pregnancy by at least 48 hours and more commonly by 72 hours.

52. This statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of the delay may reach a week or more.

53. Delay of any length in performing an abortion increases the statistical risk of mortality and morbidity. The increase in risk becomes statistically significant when the length of delay reaches one week. Moreover, even delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk.

C. Results of Bypass Proceedings, August 1, 1981, to March 1, 1986

54. The parties agreed to submit statistics reflecting disposition of bypass petitions filed in Minnesota from August 1, 1981, to March 1, 1986, in the form of tables compiling information obtained by affidavit from court officials in each Minnesota county. The table summarizing these statistics by judicial district is appended hereto.

55. During the period for which statistics have been compiled, 3,573 bypass petitions were filed in Minnesota courts. Six petitions were withdrawn before decision. Nine petitions were denied and 3,558 were granted.

56. Anomalous circumstances surrounded several of the petitions which were denied. Three denials occurred in Hennepin County. The Honorable Allen Oleisky, Judge of the Hennepin County District Court, Juvenile Division, recalls denying two of the more than one thousand petitions he has heard. One of these petitions was brought by a minor who did not actually wish to have an abortion, but rather to marry her boyfriend. Judge Oleisky denied the petition in order to assist the minor in effectuating this desire by shifting responsibility for preventing the abortion from the minor to the court. The second denial involved a minor whom the judge determined was being coerced into having an abortion by her parents. After determining the minor did not actually wish to have an abortion, Judge Oleisky denied the petition.

The Honorable Gerald G. Martin, County Court Judge for the St. Louis County Family and Juvenile Court, granted all but one of the 225 or 226 petitions he heard during the period for which statistics were compiled. The petition Judge Martin denied was submitted by a rather immature 14-year-old who was accompanied to court by her mother. The minor's father had been out of contact with the minor and her mother for more than seven years. Rather than proceed to the best interests inquiry, Judge Martin denied the petition because he was certain a notice mailed to the father's last known address would not reach him.

57. The single denials occurring in Anoka, Mower, and Lyon Counties each occurred in the first petition brought in those respective counties. The Nobles County Court denied one of the two petitions brought there to date. A comparison to the experience in the metropolitan counties, where the courts have heard large numbers of petitions and granted nearly all, suggests that some or all of the denials occurring in non-metropolitan counties are due more to the courts' unfamiliarity with the judicial bypass statute than to the petitioners' immaturity or best interests. For example, the Anoka County Court denied the first petition brought before it and then granted each of the 19 petitions heard during the remainder of the period for which statistics were compiled.

D. Effectuation of State Interests

1. *Asserted State Interests*

58. The Minnesota legislature had several purposes in mind when it amended Minn. Stat. § 144.343 in 1981. The primary purpose was to protect the well-being of minors by encouraging minors to discuss with their parents the decision whether to terminate their pregnancies. Encouraging such discussion was intended to achieve several salutory results. Parents can provide emotional support and guidance and thus forestall irrational and emotional decision-making. Parents can also provide information concerning the minor's medical history of which the minor may not be aware. Parents can also supervise post-abortion care. In addition, parents can support the minor's psychological well-being and thus mitigate adverse psychological sequelae that may attend the abortion procedure.

59. The court finds that a desire to deter and dissuade minors from choosing to terminate their pregnancies also motivated the legislature. Testimony before a legislative committee considering the proposed notification requirement indicated that influential supporters of the measure hoped it "would save lives" by influencing minors to carry their pregnancies to term rather than aborting.

2. *Testimony as to Beneficial Effect of Minn. Stat. § 144.343*

a. *Judicial Bypass/Notice Requirement*

60. The court heard testimony of judges who collectively have adjudicated over 90 percent of the parental notification petitions filed since August 1, 1981. None of these judges, on direct or cross examination, identified a positive effect of the law.

Honorable Allen Oleisky has heard over 1,000 parental notification petitions. He characterizes his function as "a routine clerical function on my part, just like putting my seal and stamp on it." Moreover, he believes that the statute dissuades some minors from having abortions because of the fear of going to court in a distant city.

Honorable Gerald Martin stated that he doesn't "perceive any useful public purpose to what [he is] doing in these cases;" moreover, he finds the court experience difficult for minors. "I think they find it a very nervewracking experience," he testified.

Honorable Neil Riley testified that he saw no beneficial effects of the statute and further that he sympathized with "the predicament" the minors were in.

Honorable William Sweeney testifed, "I know as a judge you would like to think your decisions are important, that you are providing some—you are doing some legitimate purpose. What I have come to believe. . .[is] that really the judicial function is merely a rubber stamp. The decision has already been made before they have gotten to my chambers. The young women I have seen have been very mature and capable of giving the required consent."

He further testified that "the level of apprehension that I have seen contrasted with even the orders for protection, which is a very intense situation, very volatile, and the custody questions, is that the level of apprehension is twice what I normally see in court. . . . You see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her - her hands were turning blue and it was warm in my office. . . ."

Mr. Paul Garrity, who adjudicated the same bypass petitions while a judge in Massachusetts, believed that the Massachusets law accomplished nothing. "It just gives these kids a rough time. I can't think it accomplishes a darn thing. I think it basically erects another barrier to abortion." Further, he felt going to court was "absolutely" traumatic for minors. "You know, it was just—it was just another thing at a very, very difficult time in their lives," he said.

61. Clinic counselors, who participate on a daily basis in the law's implementation, are of a similar mind. Paula Wendt has counseled or surpervised the counselling of more than 3,000 minors since the law went into effect. She concludes from her

conversations with both parents and minors that the law has not promoted family integrity or communication. The law has, more than anything, disrupted and harmed families.

On the basis of her experience, Tina Welsh concludes that the law has not benefitted intra-family communication. A minor's unplanned pregnancy is a crisis which is not conducive to an attempt to build good family communications. Ms. Welsh does not believe that the law helps teenagers make a better decision about whether [sic] have an abortion or continue the pregnancy. Requiring a minor to tell either her parents or a judge about her pregnancy and the reasons she wants an abortion makes no beneficial contribution to the minor's decision.

62. The public defenders who participate in bypass proceedings believe that the law serves no beneficial purpose. Its sole function, in their view, is to create a hurdle and impose additional stress upon the young women. Similarly, the guardians ad litem do not perceive a beneficial purpose to their participation in the process.

63. In most cases, minors seeking judicial authorization to terminate their pregnancies without informing their parents have already made up their minds before coming to court. Thus, judges, public defenders, and guardians ad litem find they impart no information and provide no counseling in the course of the bypass proceeding. Neither does the court system refer minors to their parents for guidance and support, as is demonstrated by the overwhelming rate of approval. At most, the bypass proceeding furthers the state's interest in providing minors with guidance and emotional support only insofar as the abortion clinics have expanded their counseling of minors at the insistence of judges who hear the petitions. Counselors and administrators from the major Minnesota clinics testified, however, that counseling of minors going to court and that of minors who do not differs merely in that the former are counseled about the court process and the latter are not.

64. Minors who seek authorization in Minnesota courts for confidential abortions tend to be above average in intelligence,

education, and personal motivation. They also tend to be ambitious and concerned about the effect their decision will have on their futures.

65. Minnesota courts have denied only an infinitesimal proportion of the petitions brought since 1981. This fact indicates that in Minnesota immature, non-best interest minors rarely seek judicial authorization to terminate their pregnancies without parental involvement. Such minors either inform their parents, obtain an abortion outside Minnesota, or carry the pregnancy to term.

Dr. Gary B. Melton suggested two partial explanations for this phenomenon. First, comparisons of personality functioning between adolescents who abort and those who carry to term generally show more adaptive, healthier functioning in the former group. Adaptation, in turn, marks a level of psychological and emotional development colloquially referred to as "maturity." Second, a minor's desire to maintain a measure of privacy of information about her personal matters is an important indication of individuation, a principal development task of adolescence. Indeed, defendants' witness Dr. Vincent Rue testified that teenagers in the early stage of adolescence are much more likely to discuss a pregnancy than are teenagers in the mid-phase of adolescence who typically would desire more privacy, and teenagers in the latter stages of adolescence who would be the most private, and insist upon confidentiality. Adult women, in Dr. Rue's view, would be most insistent upon maintaining the confidentiality of their decision. Therefore, while there may be "no logical relationship between the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion," *H. L. v. Matheson*, 450 U.S. 398, 408 (1981), some relationship does exist between the decision to abort in privacy and the capacity for mature judgment concerning the wisdom of this decision. Consequently, a regulation that affects only minors who have elected to terminate their pregnancies and to do so in privacy tends inevitably to reach only mature minors and immature minors driven to this choice by their own best

interests. Such a regulation will fail to further the State's interest in protecting immature, non-best interest minors.

66. Dr. Jane Hodgson, a leading practitioner in the field of obstetrics and gynecology, has given Minnesota's parental notification law considerable thought. She concludes, "I honestly think there is no benefit whatsoever." The law has created "nothing but problems" for her teenage patients. Testimony by plaintiffs' other expert witnesses, each of unquestionably high standing in his or her respective field, corroborates this opinion. For example, Dr. Stephen Butzer testified, on the basis of his clinical experience, that when knowledge of an adolescent's pregnancy or abortion is inadvertently communicated to one or both parents, the effect of the communication on the family or relationship between adolescent and parents is "almost universally negative."

67. Defendants offered the court no persuasive testimony upon which to base a finding that Minnesota's parental notification law enhances parent-child communications, or improves family relations generally. Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses. Dr. Richard T.F. Schmidt does not practice medicine in Minnesota, has never performed an abortion, and does not regularly counsel minors who wish to obtain abortions. Therefore, his testimony is less persuasive than the contrary testimony of witnesses closer in each of these respects to the issue before the court.

The court did not expect defendants to establish that in every case Minnesota's parental notification law protects pregnancy minors, promotes parent-child communication, and improves family relations generally. Defendants did establish that notification can serve these interests in individual cases. Defendants failed, however, to establish that the law promotes these values more than it undermines them. Five weeks of trial have produced no factual basis upon which the court can find that Minn. Stat. § 144.343 (2)-(7) on the whole furthers in any

meaningful way the State's interest in protecting pregnant minors or assuring family integrity.

b. *Two Parent Requirement*

68. National statistics reveal that approximately one out of every two marriages ends in divorce. There is no testimony in the trial of this case indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside with both biological parents. This figure is corroborated by one study indicating that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents.

69. Studies indicating that family violence occurs in two million families in the United States substantially underestimate the actual number of such families. In Minnesota alone, reports indicate that there are an average of 31,200 incidents of assault on women by their partners each year. Based on these statistics, state officials suggest that the "battering" of women by their partners "has come to be recognized as perhaps the most frequently committed violent crime in the state" of Minnesota. These numbers do not include incidents of psychological or sexual abuse, low-level physical abuse, abuse of any sort of the child of a batterer, or those incidents which are not reported. Many minors in Minnesota live in fear of violence by family members; many of them are, in fact, victims of rape, incest, neglect and violence. It is impossible to accurately assess the magnitude of the problem of family violence in Minnesota because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse in their families. Thus the incidence of such family violence is dramatically underreported.

70. Divorce or separation usually impairs family communication severely. The non-custodial parent often has very little communication with the child. In addition, communication between divorced or separated spouses frequently is marked

with the kind of hostility and angry vindictiveness that characterized the divorce or separation.

The effect of compelling an adolescent to share information about her pregnancy and abortion decision with both parents in a divorced or separated situation can be harmful. The non-custodial parent often will reintegrate with the family in a disruptive manner. The adolescent may be perplexed as to why the non-custodial parent should become an important factor in her life at this point, especially when the parent previously has paid her oittle [sic] attention and offered little support. Moreover, the testimony revealed no instances in which beneficial relations between a minor and an absent parent were reestablished following required notification. Therefore, the minor may suffer disappointment when an anticipated reestablishment of her relationship with the absent parent does not occur, as is most likely given the trying circumstances under which communication is renewed.

Involuntary involvement of the second biological parent is especially detrimental when the minor comes from an abusive, dysfunctional family. Notification of the minor's pregnancy and abortion decision can provoke violence, even where the parents are divorced or separated. Studies have shown that violence and harrassment may continue well beyond the divorce, especially when children are involved.

The reaction of the custodial parent to the requirement of forced notification is often one of anger, resentment and frustration at the intrusion of the absent parent. Frequently, the custodial parent fears that the absent parent will use the notification to threaten the custody rights of the custodial parent. Furthermore, a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception.

71. Twenty to twenty-five percent of the minors who go to court either are accompanied by one parent who knows and consents to the abortion or have already told one parent of their intent to terminate their pregnancy. The vast majority of these voluntarily informed parents are women who are divorced or separated from spouses whom they have not seen in years. Going to court to avoid notifying the other parent burdens the privacy of both the minor and the accompanying parent. The custodial parents are angry that their consent is not sufficient and fear that notification will bring the absent parent back into the family in an intrusive and abusive way.

72. Minors who ordinarily would notify one parent may be dissuaded from doing so by the two-parent requirement. A minor who must go to court for authorization in any event may elect not to tell either parent. In these instances, the requirement that minors notify both biological parents actually reduces parent-child communication.

c. *48 Hour Waiting Period*

73. Some period of mandatory delay between the time of actual or constructive notification of the minor's parent and the abortion itself would reasonably effectuate the State's interest in protecting pregnant minors. A waiting period may allow parents to aid, counsel, advise, and assist minors in determining whether to undergo an abortion or to provide the physician with information which may be relevant to the medical judgments involved.

74. The interest effectuated by the State's 48 hour waiting period could be effectuated as completely by a shorter waiting period. Therefore, to the extent the waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion, it fails to further the State's interest in protecting pregnant minors.

CONCLUSIONS OF LAW

Plaintiffs attack the constitutionality of Minn. Stat. § 144.343 on several fronts. First, plaintiffs contend that § 144.343, subd. 2 is facially unconstitutional because it fails to afford minors the opportunity to obtain a judicial or administrative waiver of the statute's notification requirement. *See*

Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476 (1983) (*Ashcroft*); *Bellotti v. Baird*, 432 U.S. 622 (1979) (*Bellotti II*). Second, plaintiffs contend that even with the judicial bypass procedure of subd. 6 incorporated as subd. 2(c) by virtue of this court's temporary restraining order of July 31, 1981, § 144.343 (2)-(7), as applied in Minnesota, unduly burdens the fourteenth amendment due process rights of pregnant minors. Even if § 144.343 (2)-(7) is not unconstitutional in its entirety, plaintiffs contend that the statute's requirement that minors notify both parents except when one parent is dead or the minor is unable to locate a parent with reasonable diligence, § 144.343 (2), (3), is unconstitutional. Finally, plaintiffs contend the 48-72 hour waiting period imposed upon minors who choose to notify one or both of their parents in writing, *see* Minn. Stat. § 144.343 (2)-(4), is unconstitutional because it impermissibly burdens a minor's right to choose abortion.

Noting "a requirement unduly burdensome in operation will be struck down even if not clearly invalid on its face," *see Planned Parenthood League of Massachusetts v. Bellotti*, 641 F.2d 1006, 1011 (1st Cir. 1981), this court denied defendant's motion for summary judgment with respect to plaintiffs' as applied due process challenge to § 144.343 (2)-(7). *Hodgson v. Minnesota*, Civ. No. 3-81 538 slip op. at 11 (Jan. 23, 1985). The court found that dispute existed with respect to material issues of fact including the confidentiality of the judicial bypass procedure, delays and inconvenience, and lack of access to the courts in rural counties. This list of material facts was not all inclusive. *Hodgson*, slip op. at 10. Therefore, the action proceeded to trial upon these issues and others.

I. Standard of Review

Every woman has the fundamental right to terminate her pregnancy free from government intrusion. *Roe v. Wade*, 410 U.S. 113 (1973); *see Thornburgh v. American College of Obstetricians and Gynecologists*, __ U.S. __, 106 S.Ct. 2169, 2178 (1986) (specifically reaffirming *Roe v. Wade*); *City of*

Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 (1983) (*Akron*) (similar). The right to choose abortion rather than childbirth is "not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. at 154. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. *Maher v. Roe*, 432 U.S. 464, 473-74 (1977).

A state regulation that burdens an individual's right to decide to terminate her pregnancy by substantially limiting her access to the means of effectuating that decision is subject to strict judicial scrutiny. *Carey v. Population Services International*, 431 U.S. 678, 688 (1977). Such a burden is imposed by a regulation that places an obstacle, absolute or otherwise, in the path of one seeking to exercise the protected right. *Maher v. Roe*, 432 U.S. 464, 472 (1977).

The term "undue burden" does not accurately describe the magnitude of interference necessary to trigger heightened judicial scrutiny. The Supreme Court has squarely rejected this analysis as "wholly incompatible with the existence of the fundamental right recognized in *Roe v. Wade*." *Akron*, 462 U.S. at 419-21 n. 1. Indeed, the Court's traditional three tiered constitutional analysis exists to provide the courts a value-neutral framework by which to test the constitutionality of legislative enactments. Determining whether a burden is "undue" as a threshold inquiry would leave available to judges no standard for making this determination but their individual assessment of a statute's worth. *Cf. Mississippi University for Women v. Hogan*, 458 U.S. 713, 724 n. 9 (1982) ("[W]hen a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual Members of the Court. While the validity and importance of the objective may effect the outcome of the analysis, the analysis itself does not change."). Thus the term "undue burden" as used, for example, in *Maher*, 432 U.S. at 473-74, refers to the ultimate constitutional issue under heightened judicial scrutiny, rather than the thresh-

old requirement for triggering such scrutiny. *Charles v. Carey*, 627 F.2d 772, 777 (7th Cir. 1980); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 630 n. 2 (D.R.I. 1984).

Regulations imposing a constitutionally significant burden on the free exercise of a protected right, including the right to choose to terminate one's pregnancy, must be supported by a compelling state interest. *Akron*, 462 U.S. at 427; *Roe v. Wade*, 410 U.S. at 155. Such a regulation must also be narrowly drawn to express only the legitimate state interests at stake. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977).

Constitutional rights do not mature and come into being only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (Danforth). *See Bellotti II*, 433 U.S. at 633; *Carey v. Population Services International*, 431 U.S. at 693. Similarly, the burdens imposed by state regulation of abortion are no different for minors than for adults. *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985); *see Bellotti II*, 443 U.S. at 642 ("[T]he potentially severe detriment facing a pregnant woman is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor."). Therefore, the degree of burden that triggers heightened judicial scrutiny depends in no way upon whether the regulation applies to minor or adult women.

The Supreme Court, however, long has recognized that a State has a somewhat broader authority to regulate the activities of children than of adults. *Danforth*, 428 U.S. at 74. This broader authority derives from the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing. Thus the difference between abortion statutes which regulate adults and those which regulate only

minors is that the latter may be justified by a significant state interest that is not present in the case of an adult. *Zbaraz v. Hartigan*, 763 F.2d at 1536. *See Akron*, 462 U.S. at 427 n. 10; *Carey v. Population Services International*, 431 U.S. at 693 n. 15; *Danforth*, 428 U.S. at 75. In addition, the State is not constitutionally bound to employ the least burdensome method of effectuating its interests. *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1133 (7th Cir. 1983) (*Pearson*). *Compare Pearson with Carey v. Population Services*, 431 U.S. at 688 (state regulation burdening the right of adult women to terminate their pregnancies must "be narrowly drawn to express only the legitimate state interests at stake.") Instead, the state regulation must be rationally calculated to serve the state's significant interests. *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 640 (D.R.I. 1984).

As immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interests of the minor. *Bellotti II*, 433 U.S. at 640. Therefore, a State's interest in protecting immature minors will sustain the requirement of consent, either parental or judicial. *Akron*, 462 U.S. at 439. But even the State's interest in encouraging parental involvement in their minor children's decision to have an abortion must give way to the constitutional right of a mature minor or an immature minor whose best interests are contrary to parental involvement. *Id.* at 427 n. 10; *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. at 640. *See Bellotti II*, 443 U.S. 649.

Even under the less rigorous standard applicable to regulations burdening the rights of minor women to obtain an abortion, the burden of demonstrating a connection between the regulation and the asserted state policy falls on the state. *Carey v. Population Services International*, 431 U.S. at 696, 696 n. 22; *Pearson*, 716 F.2d at 1133. Neither a bare assertion that the burden is connected to a significant state policy, *Carey*, 431 U.S. at 696, nor sentiment or folklore, *In re Gault*, 387 U.S. 1, 21-22 (1967), will satisfy this burden.

Minnesota Statute § 144.343 (2)-(7) requires minors either to notify their parents of their desire to obtain an abortion, or to obtain the judicial waiver of this requirement. The statute does not require parental consent or a waiver of parental consent. The parties agreed in response to a question from the court that the constitutional analysis applicable to notice requirements does not differ from the applicable to consent requirements. Moreover, despite the contrary suggestions of individual Members of the Supreme Court, *see Akron*, 462 U.S. at 469 (O'Connor, J., dissenting); *H.L. v. Matheson*, 450 U.S. 338, 421 (Stevens. J., concurring), the court concludes that it is "parental involvement" that an emancipated or mature minor must have an opportunity to avoid, without regard to whether that "involvement" takes the form of notification or consent. *See Akron*, 462 U.S. at 427 n. 10; *Pearson*, 716 F.2d at 1132. *See also Bellotti II*, 443 U.S. at 647 (statute unconstitutional because, *inter alia*, it failed to provide every minor an opportunity to "go directly to a court without first consulting or notifying her parents").

II. Minn. Stat. § 144.343 (2)

Subdivision 2 of § 144.343 prohibits performing an abortion upon an unemancipated minor, or upon a woman for whom a guardian or conservator has been appointed because of a finding of incompetency, until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents or guardian or conservator. By its order of July 31, 1981, this court temporarily restrained defendants from enforcing the provisions of Minn. Stat. § 144.343 (2) because the court found it probable that plaintiffs would be successful in their challenge to subdivision 2. As a result of this restraining order, subdivision 6 of § 144.343 took effect. This subdivision provides that subdivision 2 shall be enforced as though the judicial bypass provisions of subdivision 6 were incorporated as paragraph c of subdivision 2. Subdivision 6 further provides that if the court's temporary injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the substitute paragraph, and the substitute paragraph shall have no force or effect until or unless an injunction or restraining order is again in effect.

A State choosing to encourage parental involvement in their minor child's decision to have an abortion must provide an alternative procedure through which a minor may demonstrate that she is mature enough to make her own decision or that the abortion is in her best interests. *Akron*, 462 U.S. at 430 n. 10; *see Bellotti II*, 443 U.S. at 643-44. The unique nature and consequences of the abortion decision make it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of a physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." *Bellotti II*, 443 U.S. at 643; *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

The *Bellotti II* court set forth the following reqirements:

> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.

443 U.S. at 643-44. A statute that fails to provide such an alternative to a consent or notification requirement imposes an undue burden upon the exercise by minors of the right to seek an abortion. *Id.*, at 647.

Without the judicial bypass option of subdivision 6, Minn. Stat.§ 144.343 (2) would unduly burden the exercise by minors of the right to seek an abortion. There are parents who would obstruct, and perhaps altogether prevent, the minor's efforts to exercise this right. *Bellotti*, 443 U.S. at 647. Young, preg-

nant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct an abortion. *Id.; Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983). The interests of the State and of these parents, must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement. *See. e.g., Akron*, 428 n. 10. Therefore, the court concludes that it must permanently enjoin defendants from enforcing Minn. Stat. § 144.343 (2) as unmodified by subdivision 6.

III. Constitutionality of Minnesota's Parental Notification Law

Plaintiffs contend that Minn. Stat. § 144.343 (2)-(7) is unconstitutional as applied because it interferes with and burdens minors in the exercise of their constitutional rights and defendants have failed to demonstrate that the statute is necessary, narrowly drawn, and that it is accomplishing significant state interests. Defendants respond that plaintiffs' position improperly asks this court to disregard controlling Supreme Court precedent. In view of the fact that the relevant legal standards governing the constitutionality of parental notification requirements are not in dispute, *see Akron*, 462 U.S. at 439, defendants contend that the scope of this court's inquiry properly is restricted to determining whether the statute complies with the guidelines set forth by the *Bellotti II* plurality and subsequently approved by majority of the Supreme Court in *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476 (1983).

Plainly, it is within neither the power nor the desire of this court to overrule Supreme Court precedent. *E.g., Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314, 1316 (Powell, Circuit Justice 1983). Nevertheless, the court is mindful that:

> Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

United States v. Carolene Products Co., 304 U.S. 144, 153 (1938) (Citations omitted); *see New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986). *Compare Wisconsin Action Coalition v. City of Kenosha*, 767 F.2d 1248 (7th Cir. 1985) (ordinance limiting hours of solicitation held invalid) *with City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547 (7th Cir. 1986) (conducting *de novo* analysis of validity of similar ordinance). If the court properly may inquire into whether a change has occurred in the factual basis upon which the constitutionality of a statute depends, then surely an inquiry into the existence of a particular state of facts assumed but never demonstrated is at least equally proper. To this court's knowledge, it is the first ever to examine a parental notification or consent substitute statute in actual operation. *See, e.g., Akron*, 462 U.S. 425 (enforcement of ordinance enjoined before its effective date); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 483 F. Supp. 679, 683 (W.D.Mo. 1980) (statute at issue in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, enjoined on day after becoming effective); *Bellotti II*, 443 U.S. at 645 n. 25 (because appellees successfully sought to enjoin Massachusetts from putting statute into effect, there existed an "absence of any evidence as to the operation of judicial proceedings under § 12s.") Initiation of the factual inquiry mandated by the *Carolene Products* court lies squarely within the province of a federal district court. Therefore, this court heard testimony and has made findings of fact with respect to plaintiffs' allegation that Minn. Stat. § 144.343 (2)-(7) is not rationally related to the State's asserted interests.

Plaintiffs' as applied challenge to the constitutionality of Minn. Stat. § 144.343 (2)-(7) proceeded at trial on two levels. Plaintiffs' more limited challenge attached the sufficiency of

Minnesota's compliance with the *Bellotti II* guidelines for establishing an alternative procedure whereby authorization for the abortion can be obtained. *See Bellotti II*, 443 U.S. at 643-44. Plaintiffs' broader challenge attacked the assumption, implicit in the *Bellotti II* and *Ashcroft* decisions, that a notification or consent requirement imposed in conjunction with an appropriate alternative bypass procedure would serve the State's interest in protecting pregnant minors without unduly burdening the right of mature or best interests minors to obtain an abortion.

The bulk of the testimony at trial related to whether requiring pregnant minors either to notify their parents of their desire to terminate their pregnancies or to go to court to obtain a waiver of the notification requirement actually furthers the State's interest in protecting pregnant minors. The court heard testimony of at least 37 witnesses who spoke to this issue. Only two of these witnesses related facts and expressed opinions from which a court could draw a reasonable inference that the statute does young women more good than harm. Neither of these witnesses, Dr. Vincent Rue or Dr. Richard T.F. Schmidt, has any direct contact with minors affected by Minn. Stat. § 144.343 (2)-(7). Neither witness counsels minors on a regular basis concerning the decision whether to terminate a pregnancy, neither witness performs abortions, and neither witness sees minors who have had abortions on a regular basis.

Of the remaining witnesses who spoke to the issue whether Minn. Stat. § 144.343 effectuates the State's interest in protecting pregnant minors, all but four of these are personally involved in the statute's implementation in Minnesota. They are judges, public defenders, guardians ad litem, and clinic counselors. None of these witnesses testified that the statute has a beneficial effect upon the minors whom it affects. Some testified the law has a negligible effect upon intra-family communication and upon the minors' decision-making process. Others testified the statute has a deleterious affect on the well-being of the minors to whom it applies because it increases the stress attendant to the abortion decision without creating any corresponding benefit. Thus five weeks of trial have

produced no factual basis upon which this court can find that Minn. Stat. § 144.343 (2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity.

The court has considered the possibility that the statute's existence encourages immature, non-best interest minors to tell their parents, and that this intangible effect is not amenable to proof at trial. The court does not believe this to be the case. First, several witnesses who testified at trial were involved in providing abortions to minors both before and after the enactment of Minn. Stat. § 144.343 (2)-(7). These witnesses could have testified as to a change in the level of parental participation occurring at about the time of the statute's effective date. Although these and other witnesses testified that a sizable proportion of minors seeking an abortion in Minnesota voluntarily notify at least one parent of their intention, none testified that this proportion changed at or around the effective date of the Minnesota parental notification law.

Furthermore, the testimony indicates that the sort of independent self-assessment by the minor of her own maturity suggested by this scenario actually does not occur as a result of the statute. Although the major abortion providers in Minnesota inquire into a minor's maturity in the course of the informed consent process, abortion providers do not decline to assist minors because of their immaturity with any frequency. To the contrary, the testimony revealed the major providers tend to resolve any doubts as to a minor's maturity by referring her to the judicial bypass system. These minors are almost universally successful in obtaining judicial waivers. Thus there appears to be little self-selection among those minors who come to the clinics initially without both parents. Instead, any self-selection as to maturity occurring among pregnant minors appears to be a result of the natural maturation process, rather than an effect of Minn. Stat. § 144.343 (2)-(7). As described in finding of fact number 65, the desire on the part of minors to retain their privacy with respect to the abortion decision is, at least in part, a result of the maturation process. Therefore, it does not appear Minn. Stat. § 144.343

(2)-(7) has any greater beneficial effect upon immature minors than it does upon mature minors and minors whose best interests are not served by notification.

In view of the foregoing, the court finds as a matter of fact that Minn. Stat. § 144.343 (2)-(7) fails to serve the State's asserted interest in fostering intra-family communication and protecting pregnant minors. This is not a case in which the State merely has failed to demonstrate that the challenged statute employs the alternative means of effectuating its interest that is least burdensome upon the rights of the affected individuals. *See Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127, 1134 (7th Cir. 1983) (state is not constitutionally required to provide the least burdensome alternative to notification.). Similarly, this is not a case in which the legislature has utilized a yardstick that is imprecise or even unjust in particular cases. *See H.L. v. Matheson*, 450 U.S. 398, 425 (1981) (Stevens, J., concurring) (over-inclusiveness of parental-notice requirement does not undercut its validity). Instead, Minn. Stat. § 144.343 (2)-(7) imposes the substantial burden of obtaining a judicial waiver of the parental notification requirement upon a group of minors composed almost entirely of either mature minors or minors whose best interests are not served by notification. This substantial burden is not justified by the state's interests in encouraging intra-family communication and protecting immature minors because Minn. Stat. § 144.343 (2)-(7) fails to further either of those interests in any meaningful way. When, as here, the state's asserted interest fails to justify the burden imposed upon pregnant minors by an abortion regulation, the Supreme Court has invalidated such regulations as unduly burdensome upon the rights of pregnant minors. *Bellotti II*, 443 U.S. 662, 651 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

This court does not, however, write on a clean slate in determining the constitutionality of Minnesota's parental notification statute. The Supreme Court carefully delineated the elements of the alternative procedure states must employ if they wish to require parental consent or notification prior to

abortion. *Bellotti II*, 443 U.S. at 643-44. Although the Court's discussion of the necessary alternatives procedure appears in a plurality opinion and at least arguably was unnecessary to the decision in the *Bellotti II* case, the Supreme Court left no doubt as to its commitment to the *Bellotti II* procedure in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). Noting its statement in *Akron* that the relevant legal standards with respect to parental-consent requirements are not in dispute, 462 U.S. at 439, the Court treated a challenge to the constitutionality of Missouri's consent/bypass statute as an issue purely of statutory construction. *Ashcroft*, 462 U.S. at 491. Because the Missouri statute at issue could fairly be construed to comply with the *Bellotti II* requirements, it avoided any constitutional infirmities. *Id.* at 493.

Because no court has had occasion to consider the actual effect of a consent/bypass or notification/bypass statute in operation, plaintiffs contend the issue now before this court is far more complex than the statutory interpretation issue addressed by the *Ashcroft* court. Indeed, it appears to this court that the prophecy with which Mr. Justice Stevens closed his concurrence in *Bellotti II* is fulfilled.[1] Nevertheless, this court is bound by applicable Supreme Court precedent. *E.g. Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 534 (1983); *Jaffree v. Board of School Commissioners*, 459 U.S. 1314 (Powell, Circuit Justice 1983). This court has made factual findings as to the effect of Minnesota's parental notification law as it affected the minors to whom it applied between its effective date in 1981 and trial in 1986. Were this court writing on a clean slate, it could not uphold the constitutionality of Minn. Stat. § 144.343 (2)-(7) under the intermediate scrutiny appropriate in challenges to regulations that burden the fundamental rights of minors. But it is not this court's place to determine the assumptions upon which the Supreme

1 In arguing that the *Bellotti II* case presented the Supreme Court no occasion to render an advisory opinion on the constitutionality of the alternative procedure recommended in Justice Powell's plurality opinion, Justice Stevens predicted "a real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Justice Powell has elected to address." 433 U.S. at 656 n. 4 (Stevens, J., concurring).

Court based its holdings in *Bellotti II* and *Ashcroft*. Nor is it this court's place to determine whether the facts actually demonstrated at trial comport or conflict with any assumptions the Supreme Court may have made. The Supreme Court directs that this court's inquiry be limited instead to an issue purely of statutory construction. whether Minnesota provides a judicial alternative that is consistent with established legal standards. *Ashcroft*, 462 U.S. at 491-92.

Minnesota Statute § 144.343 (2)-(7) satisfies these legal standards. The court has found that Minn. Stat. § 144.343 (6) explicitly directs courts hearing bypass petitions to conduct the inquiry required by the *Bellotti II* court. Although the language of the Minnesota statute with respect to maturity varies slightly from that of the *Bellotti II* decision, the requirement that the woman be "mature and capable of giving informed consent to the proposed abortion" is the functional and legal equivalent of the Supreme Court's requirement that the minor be "mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes." *See Bellotti II*, 443 U.S. at 643.

Arguably, however, the statute's requirement that the court inquire in the case of an immature minor "whether the performance of an abortion upon her without notification of her parents, guardian, or conservator would be in her best interests" differs from the Court's inquiry whether "the desired abortion would be in her best interests." *See id.* at 644. Indeed, testimony indicates that some Minnesota courts consider whether the abortion itself is in the minor's best interests, while others examine whether avoiding parental involvement in the minor's decision, whatever it may be, is in the minor's best interests. This court, however, perceives that the former inquiry imposes the greater burden upon the minor in terms of what she must demonstrate before proceeding without involving her parents. Because the Supreme Court's language approves the imposition of this more restrictive standard, this court concludes that the practice of some Minnesota courts of interpreting Minn. Stat. § 144.343 (6) to require a less intrusive and less burdensome inquiry does not violate the legal standards set forth in *Bellotti II* and approved in *Ashcroft*.

The court further finds that judges who hear the bypass petitions in Minnesota faithfully apply the standards set forth in Minn. Stat. § 144.343 (6), and those judges who consider themselves unable to faithfully apply the standard have consistently refused to hear bypass petitions. Furthermore, the court finds that Minnesota courts have established procedures to assure the minors' anonymity, and to expedite both the initial hearing and any subsequent appeal. Finally, the court finds that the delays which do attend the bypass proceedings in practice, although burdensome to minor petitioners, do not reflect a systemic failure to provide a judicial bypass option in the most expeditions, practicable manner. Accordingly, the court concludes that the judicial bypass procedure created by Minn. Stat. § 144.343 (6), as presently executed by Minnesota courts and other offices that participate in the bypass proceedings, complies with the procedural requirements set forth in *Bellotti II* and approved in *Ashcroft*. Therefore, the courts must reject plaintiffs' challenge to Minnesota's notification/bypass requirement as a whole.

IV. Two Parent Notification Requirement

Subdivision 3 of Minnesota Statute § 144.343 identifies the individuals entitled to notification as "both parents of the pregnant woman if they are both living, one parent of the woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one." Plaintiffs contend the statute's two parent notice requirement unduly burdens the exercise by minors of the right to seek an abortion. The court finds that this requirement places a significant burden upon pregnant minors who do not live with both parents. Particularly in these cases, notification of an abusive, or even a disinterested, absent parent has the effect of reintroducing that parent's disruptive or unhelpful participation into the family at a time of acute stress. Similarly, the two parent notification requirement places a significant obstacle in the path of minors in two parent homes who voluntarily have consulted with one parent but not with the other out of fear of psychological, sexual, or physical abuse toward either the minor or the

notified parent. In either case, the alternative of going to court to seek authorization to proceed without notifying the second parent introduces a traumatic distraction into her relationship with the parent whom the minor has notified. The anxiety attending either option tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent.

The State has the burden of demonstrating that its interest in encouraging parental consultation justifies the burden imposed upon pregnant minors by the statute's two parent notification requirement. *See, e.g., Carey v. Population Services International*, 431 U.S. 678, 696 n. 22 (1977); *Pearson*, 716 F.2d at 1133. The Supreme Court has concluded that the requirement of obtaining both parents' consent does not unconstitutionally burden a minor's right to seek an abortion "[a]t least when the parents are together and the pregnant minor is living at home." *Bellotti II*, 443 U.S. at 649. When all three live together, both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of the daughter. *Id.* This court concludes, however, that a regulation requiring notification of both parents even when the nuclear family unit either has broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors.

To the contrary, the court finds that the regulation adversely affects communication voluntarily initiated with one parent in a large number of cases. Indeed, 20 to 25% of minors seeking judicial authorization to proceed with an abortion without parental notification are accompanied to court by one parent, or at least have obtained the approval of one parent. In these cases the necessity either to notify the second parent despite the agreement of both the minor and the notified parent that such notification is undesirable, or to obtain a judicial waiver of the notification requirement, distracts the minor and her parent and disrupts their communication. Thus the need to notify the second parent or to make a burdensome court appearance actively interferes with the parent-child communication voluntarily initiated by the child, communication assertedly at the heart of the State's purpose in requiring notification of both parents. In these cases, requiring notification of both parents

affirmatively discourages parent-child communication. Thus the court concludes that this requirement fails to further the State's interest. Because "state restrictions inhibiting privacy rights of minors are valid only if they serve any significant state interest," *Carey v. Population Services*, 431 U.S. at 693; *Danforth*, 428 U.S. at 75, the court must enjoin defendants from enforcing the two parent notification requirement of Minn. Stat. § 144.343.

V. Waiting Period

Minnesota Statute § 144.343 (2) prohibits performing an abortion upon an unemancipated minor until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents. The notice may be delivered personally to the parent by the physician or his agent, or notice may be made by certified mail addressed to the parent at his usual place of abode, with constructive delivery occurring at 12:00 noon on the next day upon which regular mail delivery takes place, subsequent to mailing. Thus minors in Minnesota who choose to notify their parents in writing of their determination to obtain an abortion must wait at least 48 hours, and more commonly approximately 72 hours, between initiating the notification process and the abortion itself.

Lower courts have split on the issue of the constitutionality of mandatory waiting periods imposed upon minor women seeking abortion. Some courts, including this one, have found that a reasonable period of notice is permissible to allow parents to aid, counsel, advise, and assist their minor daughter in connection with the determination to undergo abortion or to provide the physician with information which may be relevant to the medical judgments involved. *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123, 1138-39 (N.D. Ohio 1986); *Hodgson v. Minnesota*, Civ. No. 3-81-538, slip op. at 5 (D.Minn. March 22, 1982). The *Rosen* court concluded that the notification requirement which the Supreme Court explicitly upheld for immature minors in *Matheson* would be an empty formalism with no practical effect if the abortion could proceed before parental consultation could take place. 633 F. Supp. at 1139.

The Seventh Circuit Court of Appeals has invalidated an Illinois statute requiring pregnant minors to wait 24 hours between notifying their parents and obtaining an abortion. *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985). The *Zbaraz* court based its decision upon its conclusion that the mandatory waiting period placed a direct and substantial burden on women who seek to obtain an abortion, and that the waiting requirement did not significantly further the State's interest in promoting consultation when combined with the notification requirement because the notification requirement itself adequately promotes the State's interest. 763 F.2d at 1537-38. The court further concluded that the statutory alternatives to the mandatory waiting period, such as having both parents accompany the minor to the place the abortion will be performed or having both parents submit signed, notarized statements indicating they have been notified, do not redeem the statute. *Id.* at 1538. The Seventh Circuit based its decision in large part upon its prior decision in *Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson*, 716 F.2d 1127 (7th Cir. 1983). There the court upheld a mandatory waiting period to the extent it delayed the abortion for the purpose of effective constructive notice. *Id.* at 1142-43. Requiring delay after notification has been effected, however, is impermissible. *Id.*; *see Zbaraz*, 763 F.2d at 1538.

The Eighth Circuit Court of Appeals three times has affirmed district court decisions that a mandatory 48 hour waiting period, applicable to adult and minor women alike, is unconstitutional. *See Women's Services, P.C. v. Thone*, 690 F.2d 667, 668-69 (8th Cir. 1982), *vacated and remanded for further consideration sub nom. Kerrey v. Women's Services, P.C.*, 462 U.S. 1126 (1983); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd* 462 U.S. 476 (1983); *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration sub nom. Thone v. Women's Services, P.C.*, 452 U.S. 911 (1981). The state of Missouri did not appeal the Eighth

Circuit's decision in *Ashcroft* invalidating the statute's 48 hour waiting period.

This court agrees with the district court for the Northern District of Ohio that a notification requirement would be an empty formalism without practical effect if the abortion could proceed before the parental consultation could take place. *See Rosen*, 633 F. Supp. at 1139. However, the waiting period must effectuate actual consultation without unduly burdening the opportunity of pregnant minors to obtain an abortion. In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hours waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interests in encouraging parental consultation, because a shorter waiting period would effectuate that interest as completely. Therefore, the court concludes that if a minor chooses to notify her parent by certified mail as provided in Minn. Stat. § 144.343 (2)(b), the State properly may deem delivery to occur at 12:00 noon on the next day on which regular mail delivery takes place, subsequent to mailing. The State further may impose some reasonable waiting period subsequent to delivery of notification during which consultation may occur. Under conditions presently existing in Minnesota, however, 48 hours is an unreasonable waiting period. Therefore, the court will enjoin defendants from enforcing the 48 hour waiting period imposed by Minn. Stat. § 144.343 (2).

VI. Severability

Defendants contend that the two parent notification requirement and the 48 hour waiting period, which the court today holds unconstitutional, should be severed from the remainder of Minn. Stat. § 144.343 (2)-(7).

Subdivision 7 of Minnesota's parental notification statute provides:

> If any provision, word, phrase or clause of this action or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of this section which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, words, phrases, and clauses of this section are declared to be severable.

This language clearly evinces the legislature's intent that any unconstitutional portions of Minnesota's parental notification statute amenable to severance should be severed.

Subdivision 7 creates a "presumption of divisibility" and places "the burden . . . on the litigant who would escape its operation." *Carter v. Carter Co.*, 298 U.S. 238, 335 (1936) (Cardozo, J.). *See Regan v. Time, Inc.*, 468 U.S. 641, 643 (1984); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 932 (1983). Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. *See Regan* 468 U.S. at 653; *Chadha*, 462 U.S. at 932. Severance is improper, however, if the offending language is "inseparably intertwined" within a subsection of the law. *Women's Services, P.C. v. Thone*, 636 F.2d 206, 210 (8th Cir. 1980), *vacated for further consideration on other grounds sub nom. Thone v. Women's Services P.C.*, 452 U.S. 911 (1982).

The 48 hour waiting period in Minn. Stat. § 144.343 (2)-(7) is severable from the remainder of the statute. Excising the words "at least 48 hours after" from subdivision 2 does not disable the statute from reasonably effectuating the legislature's intent. Accordingly, the court holds that this language is severable from the remainder of Minn. Stat. § 144.343. *See Zbaraz v. Hartigan*, 463 F.2d 1532, 1545 (7th Cir. 1985), *appeal docketed*, No. 85-673 (U.S. Oct. 16, 1985).

The language of subdivision 3 defining "parent" as "both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one" is inseparably intertwined within Minn. Stat. § 144.343 (2)-(7). The Minnesota legislature would not have enacted a statute requiring notification of a minor's parents prior to the abortion without identifying the individuals entitled to such notice. More importantly, the remainder of the statute cannot be given effect without the offending language. *See* Minn. Stat. § 144.343 (7).

In addition, this court is ill-situated to determine what alternative definition the legislature would employ to remedy the constitutional infirmity identified in this decision. For example, the legislature may determine that requiring notice only to one parent is the functional equivalent of requiring notice to both in families enjoying healthy communication, while requiring notice only to one parent permits the notified parent in an intact but dysfunctional family to exercise his or her judgment concerning the wisdom of notifying the other parent. Alternatively, the legislature may determine that notification of both parents is appropriate when the parents are together and the pregnant minor is living at home. *See Bellotti II*, 443 U.S. at 649. Other options also may suggest themselves to the legislature. Any of these choices, however, would leave Minn. Stat. § 144.343 (2)-(7) with little resemblance to the program actually intended by the Minnesota legislature. *See Thornburgh v. American College of Obstetricians and Gynecologists*, __ U.S. __, __, 106 Sup. Ct. 2169, 2181 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 472 (1983) (O'Connor, J., dissenting). Therefore, the definition of parent contained in Minn. Stat. § 144.343 (3) is not severable from the remainder of the statute. The court must enjoin defendants from enforcing Minn. Stat. § 144.343 (2)-(7) in its entirety.

ORDER

Upon the foregoing, the evidence presented at trial, the submissions and arguments of the parties, and the record as presently constituted,

IT IS ORDERED That Minn. Stat. § 144.343 (2)-(7) be and the same hereby is declared unconstitutional.

IT IS FURTHER ORDERED That the Clerk enter judgment as follows:

> IT IS ORDERED, ADJUDGED, AND DECREED That Minn. Stat. § 144.343 (2)-(7) is unconstitutional.

IT IS FURTHER ORDERED That defendants be and the same hereby are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343 (2)-(7).

IT IS FINALLY ORDERED That the following injunction shall issue without security:

> IT IS ORDERED, ADJUDGED, AND DECREED That defendants are permanently enjoined from enforcing the provisions of Minn. Stat. § 144.343 (2)-(7).

DATED: November 6, 1986.

/s/ DONALD D. ALSOP
Donald D. Alsop
Chief U.S. District Judge

Appendix B

The Massachusetts Judicial Consent Hearing: Is It a Rubberstamp Proceeding?*

By A.J. Pliner and S. Yates

Abstract. This study examined the Case Summaries Questionnaires completed by attorneys representing minors at judicial consent for abortion hearings in Massachusetts and filed with the Women's Bar Association. The 477 Case Summaries filed between December 1981 and June 1985 were analyzed to provide a more systematic account of how the judicial consent statute is applied in the courtroom. After hearings which typically lasted 12 minutes, only 9 minors were judged immature. No evidence for a discernable pattern justifying these rulings emerged from an examination of petitioner and court characteristics such as age, length of hearing, number of weeks pregnant, or presiding judge. Further, 11 lawyers privately reported they found their clients immature. In only one instance, however, did the lawyer and judge identify the same adolescent. Findings indicate that the decisions made in these cases tend to be arbitrary and fail to protect the interest of the minors involved.

Introduction

The constitutional right to choose abortion was extended to minor women in the 1976 (Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 1976), three years after the landmark Supreme Court decision granting this right to adult women (*Roe v. Wade,* 410 U.S. 113, 1973). The right to abortion afforded the minor, however, is not equivalent with that of the adult. Whereas the adult's woman's right is restricted by the duration of her pregnancy (*Roe* at 163), the minor's right is further delimited by the maturity level of the minor (*Danforth* at 75). Because of the presumed "peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of

* Presented at the 94th Annual Meeting of the American Psychological Association, Washington D.C., August, 1986.

the parental role in child rearing" (*Bellotti v. Baird II*, 443 U.S. 634, 1979), a state may constitutionally encourage a minor to seek parental consent. In response, many state legislatures have enacted abortion laws which regulate minors' reproductive decisions.[1]

State abortion laws requiring third party consent for minors have been consistently contested. Opponents argue these regulations do not promote state interests in family integrity and the minor's welfare, but, in fact, impose an undue burden on the minor.[2] There is a growing body of literature which calls into question the basic assumptions upon which such laws are based. Research indicates, for example, that the minor is *more* vulnerable to medical risk if she carries the pregnancy to term rather than aborts.[3] Similarly, the available correlational evidence disputes the supposition that a pregnant adolescent seeking an abortion is generally incapable of making an informed decision. Minors who chose to abort have been found as a group to exhibit more adaptive and healthier functioning than those who carry the pregnancy to term.[4] Further, there is no evidence that the pregnancy-related decisions made by minors are generally less informed than those made by adults.[5]

Attempts to document the actual functioning of these statutes raise questions about their efficacy. A time-series analysis undertaken to assess the impact of the Massachusetts parental consent law indicates the statute has had little effect on the number of adolescents who conceive, abort, or give birth. Rather, the major impact of the statute appears to have been that the number of young women traveling out of state for abortions has increased markedly.[6] In reviewing the evidence presented to it, a Minnesota District Court (*Hodgson v. Minnesota*, 648 F. Supp. 756, 1986) recently found that the defendants failed to establish that the law promotes the values of parent-child communication and improved family relations more than it undermines them. Indeed, none of the judges called to testify in that case identified a positive effect of the law.

Opponents further contend that clear lack of standards against which maturity levels can be accuracy assessed produced judicial authorization for abortion based on arbitrary

findings. Assessing the validity of this charge, however, has been more difficult. To date, only individual impressions and personal testimony have been brought to bear on the question. No systematic and empirical analysis of how these statutes are applied in the courts exist. This lack is due, in part, to the problems associated with any attempt to analyze confidential hearings. Because the court records of these hearings are impounded, only available public indicators can be employed in the analyses.

The inability to examine directly the rulings in these cases places severe limits on the ability of researchers to systematically assess judicial decisions. Still, the need to determine what standards judges do employ when assessing maturity and whether the resulting decisions reflect consistent, nonarbitrary judgments is paramount.

The purpose of the data presented here was to obtain some measure of how one parental/judicial consent statute, implemented in Massachusetts in April 1981, operates. The Massachusetts Woman's Bar Association maintains an archive of Case Summary questionnaires submitted voluntarily by lawyers representing pregnant minors. Analyses of lawyers' descriptions of the hearings, provide the basis from which some tentative formulations about the nature and quality of the decisions can be made. In particular, we sought to identify indicators that might show whether the decisions rendered indicate the law is being applied in a coherent and consistent manner.

Following two successful challenges (*Bellotti v. Baird I*, 428 U.S. 132, 1979 and *Bellotti v. Baird II*, 443 U.S. 634, 1979), the Massachusetts state legislature enacted a statute incorporating a two-tier bypass standard.[7] An unmarried minor seeking an abortion must first obtain the consent either from her parents or a Superior Court judge. If judicial consent is sought and the Court finds the minor mature, the judge is required to grant the minor's petition. If, however, the minor is adjudged immature, then the judge must determine whether an abortion would be in the minor's best interest, and if so, grant the petition.

The Massachusetts consent statute is exemplary in that a justice of the Massachusetts Supreme Judicial Court (S.J.C.), responding to a request form the Planned Parenthood League of Massachusetts,[8] furnished judges with standards to make factual determinations of maturity and best interests. To this end, in June of 1981 he issued both procedural and factual guidelines for the implementation of the consent law. First, these guidelines stipulate that a minor's consent petition should be heard as expeditiously as practicable, preferably on the same day as requested. Second, they set forth the factors that judges should use as the bases for maturity determinations.[9] The guidelines state that a judge may appropriately inquire into such areas as the minor's age, schooling and work experience, the abortion counselling received, and the nature of her decision, (i.e., whether the decision was personal and made voluntarily). Further, the judge may inquire into the minor's understanding of the abortion procedure as well as the risks and complications inherent in the procedure.

Method

Young women seeking abortions through most Massachusetts abortion clinics and in need legal assistance are referred to members of an Attorney Referral Panel of the Women's Bar Association (W.B.A.) established to provide legal representation to these minor women. Panel members are asked to submit a completed Case Summary Questionnaire for each client they represent to the W.B.A. The Case Summary Questionnaire primarily employs an open-ended format to elicit a variety of information about the background and handling of each judicial consent case. The four page survey inquires about the attorney's view of the client, the presiding judge, and the court proceedings. In one section, lawyers are asked whether they consider their client mature and if so, why? The lawyer also records the judge's ruling in the case.

Two independent raters classified each maturity indicator cited by the attorneys are falling into one of nine possible categories: the client's level of schooling; life and work experience; age; knowledge of the abortion procedure, risks, and alternatives; whether counseling was sought; plans for the future; general demeanor; general level of intelligence; or unclassifiable. The first six are derived directly from the S.J.C. Guidelines. Demeanor and general intelligence were added to the classification scheme because attorneys often cited them spontaneously. The raters reached a high level of absolute agreement (91%) and disagreements were resolved through discussion.

Between December 1981 and June 1985, 500 Case Summaries were filed.* Of these, 23 could not be analyzed because the representing attorney did not use the standard Case Summary Questionnaire. As as result, analyses presented here are based on the 477 cases for which more complete and standardized information is available.

Results

Demographics. The average age of the minors petitioning the court for authorization for an abortion was 16.33 years (Range 13-17 years). The majority (86%) were still in their first trimester ($M = 10.4$ weeks pregnant). In 9.4% of the cases, minors were appealing their parent(s) refusal to give consent. The remaining 90.6% either felt they could not or preferred not to seek consent from their parents. Of the 477, 64 or 13.4% were no longer living with a parent or guardian and 43 or 9% were already children from previous pregnancies.**

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* The number of case summaries filed by attorneys represents about 23% of the total number of judicial consent hearing held in Massachusetts during the time period studied. While the archive consists of a volunteer rather than a truly random sample, evidence indicates that the cases returned are typical. The amount of delay imposed by the trial, average age of the petitioners, length of the hearing itself, and number of cases decided in favor of the petitioner as reported in our sample is consistent with the petitioner and court characteristics reported by others.[10, 11]

** Data about the numbers of minors who had previously become pregnant but had either terminated the pregnancy or had given the child up for adoption are not available.

Maturity determination. Only 9 minors out of the pool of 477 were assessed by the judges as being immature. In eight of the nine cases, however, the judge granted the petition as being in the minor's best interest. The ninth minor chose to go out of state for the abortion rather than appeal the ruling.

The finding of maturity in almost every hearing precludes the use of inferential techniques to uncover which factors (if any) are reliably related to these judicial decisions. Descriptive information for each of the nine cases were isolated to see if any factor characterized those adolescents judged immature. The most striking finding to result from this inspection was the failure of any indicator to single out these individuals. Only one of these minors had delayed seeking court approval until she was in her second trimester and facing the more complicated procedure. Three of the petitions came from 17 year-olds, three were from 16 year-olds, one was from a 15 year-old, and two were fron 14 year-olds. (The 13 year old in our sample was considered mature.) Two of the nine were already living independently from their parents or guardians. While the average duration of the hearings was longer than standard for two of the minors (60 minutes each), the remaining seven cases ranged from only 5 to 20 minutes in length. Different judges presided over each of the cases.

Perhaps the most surprising finding resulted from a comparison of lawyers' and judges' maturity assessments. While judges found only 9 minors immature, the lawyers involved in these hearing considered their client immature in 11 cases. In only *one* case, however, did the judge and the lawyer identify the same adolescent as being immature. Thus, the lawyers representing eight of the nine minors adjudged immature considered them mature, while ten of the minors the representing attorneys considered immature were pronounced mature by the presiding judge. Expert witnesses were not called upon to present evidence in any of these hearings.

Another way of expressing the degree to which the proceedings reflect a sensitivity to the range of considerations stipulated by the judicial guidelines is to simply examine the hearing duration. In order to reach a decision, it is presumed that the

judge, after establishing rapport will query the minor on several matters, including, but not limited to, her home life, schooling, work experience, future plans, knowledge of the abortion procedure, reasons for selecting this alternative, and reasons for choosing to seek judicial authorization. Given all the information the judge is expected to elicit, one would expect the procedure to be fairly lengthy. On the contrary, the average length of the hearing is 12.12 minutes and more than 92% of the hearings are less than or equal to 20 minutes.

Even though the average length of the hearing is brief, one would expect that the duration of the hearing would differ among adolescents in their first and second trimesters. Because second trimester abortions are riskier procedures, it might be presumed that the judge would take greater efforts to make certain the minor was aware of the medical procedure. Similarly, he/she might reasonably be expected to probe more deeply into the adolescent's reasons for delaying her initiation of the proceeding. Yet, the data do not suggest this. The correlation between number of weeks pregnant and the length of the hearing failed to provide any evidence that the length of time needed to reach a decision was any different for teens seeking consent early in their pregnancy relative to those who had delayed taking action and were now faced with the more complicated procedure ($r = .07$, $p =$ n.s.).

Shifting to an examination of all the reasons cited by lawyers for believing their clients mature does not provide strong evidence that the S.J.C. Guidelines direct these assessments. Of the six categories drawn directly from the Guidelines, only one—the minor's knowledge of the abortion procedure, risks, and alternatives—was cited in over a third (42%) of the cases. The client's life or work experience was cited in 24.7%; the fact that she was already living emancipated from her parents or very close to the age of emancipation in 20.4%; her ability to plan for the future in 19%; her level of education in 13.6%; and the extent to which she had consulted with others in only 5.2%. More commonly, the lawyers referred some less tangible quality such as her general personality and demeanor (49.2%) or innate intelligence (32.2%).

Delay. Data on the length of delay between the time that the lawyer was first contacted and the time of the hearing was available for 397 cases.* The overall average delay imposed by the proceeding was 4.2 days, but specific delays ranged from 1 to 39 days. The issue of delay is a crucial one since medical risks increase dramatically with the passage of time.

An effort was made, therefore, to assess the degree to which the judicial system is sensitive to this issue and makes special efforts to eliminate delay for those minors who are at the greatest risk. While the hoped for negative correlation between length of delay in days and number of weeks pregnant is significant ($r = -.11$, $p < .03$), the variable accounts for less than 2% of the variance. Only the power afforded by the large sample size allows the difference to be detected.

Discussion

Theoretically, a consent statute which requires discriminating assessments of maturity would result in some variance. Its failure to do so calls into question the effectiveness of the statute. While a comparison between the basis for judgments of maturity versus immaturity was rendered statistically impossible because nearly every minor was adjudged to be mature, some observations about the nature of judgments are possible.

The fact that the presiding judge and representing lawyer agreed in their belief that a minor was immature in only one case indicates that these are not clear and reliable decisions. Further, the extremely brief length of the hearings indicates the decision-making process is, at best, a perfunctory.

One can well sympathize with a judge's dilemma. At the consent hearings, judges are faced with a formidable task. He/she must make a finding as to an adolescent's maturity, an area well outside the scope of the judges's expertise and training.

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* The missing data reflect a wording problem in the questionnaire format. At one point in the questionnaire, the lawyer is asked to state both the time *and* place of the hearing. Only one space follows this compound question. As a result, many lawyers provided only either the time *or* place in response to this item.

One would be hard pressed to envision any set of circumstances in which it would be in the best interests of a minor adjudged immature, to be denied an abortion. Aside from fireside logic, psychological and medical literature support this notion. First, the adolescent who undergoes an abortion is exposed to far fewer medical risks than if she were to carry the pregnancy to term.[3] Second, the psychological trauma to the abortion are generally temporary and outweighed by positive life changes and feelings of relief.[12]

Perhaps judges recognizing this flaw, prefer to find minors mature even if they do not have a clear and factual rationale to support the finding. The failure of the analysis to indicate any significant difference between the duration of the hearings for the first versus second trimester pregnancies is indicative of this mentality: since the outcome of these proceedings is, for all intents and purposes, predetermined, there is no need to treat petitioners in advanced stages of pregnancy differently from those earlier in their term.

The finding that factors stipulated in the S.J.C. guidelines are not frequently cited by attorneys in their evaluations of maturity, whereas, two vague and more global variables not mentioned in the guideline are commonly cited also provides evidence of some degree of caprice in the consent hearings. It is unlikely that the decision-making process of minors will be protected or improved by being subjected to a judicial proceeding whose decisions are made in a hasty manner, on the basis of extremely limited information, and without benefit of consistent standards.

It is possible, of course, that the findings accurately reflect that only mature minors seek to appeal or bypass parent involvement. Indeed, the court in *Hodgson* (at 767) concluded that "immature, non-best interest minors . . . either inform their parents, obtain an abortion outside Minnesota, or carry the pregnancy to term." If this is true, however, then the statute does not affect, let alone serve to further the welfare of immature, non-best interest minors.

Finally, two factors related to the delay of the abortion imposed by these hearings should be considered. First, the

delay measured in this study in all probability represents at least a one day underestimate of the delay imposed on the minor who seeks judicial authorization for an abortion. Hence, in actuality, the minors in this study experienced an overall average delay of 5.2 days.

Second, and more importantly, although a 4.2 to 5.2 day delay may appear inconsequential at first blush, further examination highlights the critical effect of this delay on the pregnant young woman. Each day the pregnancy is prolonged, the risks and complications of terminating the pregnancy are enhanced.[3] This concern is particularly acute for the minor in her eleventh or twelfth week of pregnancy and is entering her second trimester. Second trimester abortions are more complicated, more costly, and pose greater medical risks to the minor.[3] Interestingly enough, despite these factors, this study found only slight differences in the delays encountered by minors seeking a hearing during later versus earlier stages of pregnancy.

Successful challenges have been able to enjoin consent statutes failing to include constitutional safeguards to minors' rights to access to abortion. No challenges, however, have yet successfully disputed the concept that there should be either parental or judicial involvement in the abortion-related decisions made by adolescents. The analysis presented here adds to a growing body of evidence that suggests the Massachusetts consent statute does not (and perhaps can not) function as intended. The brevity of the court hearings, the overwhelming findings of maturity, and the lack of concordance between judges' and attorney's assessments of maturity in no way indicate that this third party consent provision protects the welfare of the minor. On the contrary, her welfare may be jeopardized by delaying the abortion for which she will inevitably receive authorization.

ACKNOWLEDGEMENTS

We gratefully acknowledge the assistance of Jamie Ann Sabino, chair of the steering committee of the MGL c12 s12S Lawyers Referral Panel, who made the Case Summary Questionnaires available to us. We also thank Gary B. Melton for his comments on an earlier draft of this paper. A preliminary version of this paper was presented at the 94th Annual Meeting of the American Psychological Association, Washington, DC, August 22-26, 1986. A subset of this data was initially discussed in a thesis presented by Ms. Pliner to the Psychology Department at the University of Nebraska in partial fulfillment of the Masters of Arts degree.

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Appendix C

STATE STATUTES

1. Statutes Authorizing Minors to Consent to Treatment For Venereal Disease:

Alabama: Ala. Code § 2216-9 (1975) ("12 years of age or older"); *California*: Cal. Civ. Code § 34.7 (West 1982) ("12 years of age or over"); *Idaho*: Idaho Code § 39-3801 (1985) (14 "years of age or older"); *Illinois*: Ill. Ann. Stat. Ch. 111, paras. 4504 to 4505 (Smith-Hurd 1978) ("12 years of age or older"); *Iowa*: Iowa Code Ann. § 140.9 (West Supp. 1986); *Minnesota*: Minn. Stat. Ann. § 144.343 subd. 1 (West Supp. 1986); *Nebraska*: Neb. Rev. Stat. § 71-1121 (1981); *Nevada*: Nev. Rev. Stat. Ann. § 141:11-a (1977) ("14 years of age or older"); *North Dakota*: N.D. Cent. Code § 14:10-17 (1981) ("14 years or older"); *South Dakota*: S.D. Codified Laws Ann. § 34-23-16 (1986); *Vermont*: Vt. Stat. Ann. tit. 18, § 4226(2) (1982); *Virginia*: Va. Code § 54-325.2(D)(1) (Supp. 1986); *Washington*: Wash. Rev. Code § 70.24.110 (1975) ("14 years of age or older"); *Wyoming*: Wyo. Stat. § 354-131 (1986). *No minimum age requirement*; *New Jersey*: N.J. Stat. Ann. § 0.17A-4 (West Supp. 1986); *Oklahoma*: Okla. Stat. Ann. tit. 63, § 1-532.1 (West 1984); *Utah*: Utah Code Ann. § 26-618(1) (1984); *West Virginia*: W. Va. Code § 164-10 (1985); *Wisconsin*: Wis. Stat. Ann. § 143.07 (lm) (West Supp. 1986). *Law specifically prohibits physician from notifying parents: Connecticut*: Conn. Gen Stat. Ann. § 19a-216 (West 1986); *North Carolina*: N.C. Gen Stat. § 90-21.4(b) (1985) (allows a physician to notify parents *only* when, in his/her opinion, notification is essential to the life or health of the minor): N.Y. Pub. Health Law § 2306 (McKinney 1985); *New York*; N.Y. Pub. Health Law § 17 (McKinney Supp. 1986). *Law leaves decision as to notification of minor's parents to the doctor's discretion*; *Alabama*: Ala. Code § 22-16-9 (1975); *Arkansas*: Ark. Stat. Ann. § 82-631 (1976); *Colorado*: Colo. Rev. Stat. § 254-402(3) (1982); *Delaware*: Del. Code Ann. 13 § 708 (1981); *Florida*: Fla. Stat. Ann. § 384.061 (West 1986); *Georgia*: Ga. Code

Ann. § 31-17-7 & 37-78 (1985); *Hawaii*: Haw. Rev. Stat. §§ 577A-2 to 577A-4 (1976); *Illinois*: Ill. Ann. Stat. ch. 111, paras. 4504 to 4505 (Smith-Hurd 1978); *Kansas*: Kan. Stat. Ann. § 65-2892 (1985); *Kentucky*: Ky. Rev. Stat. § 214.185 (1) (1982); *Maine*: Me. Rev. Stat. Ann. tit. 32 §§ 2595, 3292 (1978); Me. Rev. Stat. Ann. tit. 22 § 1823 (Supp. 1985); *Maryland*: Md. Health-General Code Ann. § 20104 (1982); *Massachusetts*: Mass. Gen. Laws. Ann. ch. 111, § 117, ch. 112, §§ 12, 12F (West 1975); *Michigan*: Mich. Comp. Laws Ann. § 333.5257(2) (West 1980); *Mississippi*: Miss. Code Ann. § 41-41-13 (1981); *Missouri*: Mo. Ann. Stat. §§ 431.061(4)(b) to 431.062(3) (Vernon Supp. 1986); *New Jersey*: N.J. Stat. Ann. § 9:17A-4 to 17A-5 (West 1976 & West Supp. 1986); *Oregon*: Or. Rev. Stat. §§ 109.610, 109.650 (1977); *Texas*: Tex. Fam. Code Ann. § 35.03 (Vernon 1986).

2. State Statutes Authorizing Minors to Consent To Prenatal Care:

Prenatal care: *Alabama*: Ala. Code § 22-8-6 (1984); *Alaska*: Ala. Stat. § 09.65.100(3) to (4) (1983); *Arkansas*: Ark. Stat. Ann. § 82-363(d) (1976); *California*: Cal. Civ. Code § 34.5 (West 1982); *Delaware*: Del. Code Ann. tit. 13 § 708 (1981); *Florida*: Fla. Stat. Ann. § 743.065(1) (West 1986); *Georgia*: Ga. Code Ann. §§ 31-9-2(5) (1985); *Hawaii*: Haw. Rev. Stat. § 577A-2 (1976); *Illinois*: Ill. Ann. Stat. ch. 91, para. 18.1 (Smith-Hurd 1966); *Kansas*: Kan. Stat. Ann. § 38-123 (1981); *Kentucky*: Ky. Rev. Stat. Ann. § 214.185(1) (Baldwin 1986); *Louisiana*: La. Rev. Stat. Ann. § 40:1299.53(e) (West 1977); *Maryland*: Md. Health-General Code Ann. § 20-102(4) (1982); *Montana*: Mont. Code Ann. § 41-1-402(c) (1985); *Nevada*: Nev. Rev. Stat. § 129.030(c) (Michie 1986); *New York*: N.Y. Pub. Health § 2.504(3) (McKinney 1985); *Massachusetts*: Mass. Gen. Laws Ann. ch. 112, § 12F (West 1983); *Minnesota*: Minn. Stat. Ann. § 144.343 (West Supp. 1986); *Mississippi*: Miss. Code Ann. § 41-41-3 (West 1981 and Supp. 1986); *Missouri*: Mo. Ann. Stat. § 431.061 1(4)(a) (Vernon Supp. 1986); *New Jersey*: N.J. Stat. Ann. § 9:17A-1 (West 1976); *New Mexico*: N.M. Stat. Ann. § 24-1-13 (1978); *North Carolina*: N.C. Gen Stat. § 90-21.5(B) (1985); *Oklahoma*: Okla.

Stat. Ann. tit. 63 § 2602(A)(3) (West 1984); *Pennsylvania*: Pa. Stat. Ann. tit. 35 § 10103 (Purdon 1977); *Texas*: Tex. Fam. Code Ann. § 35.03(a)(4) (Vernon 1986); *Utah*: Utah Code Ann. § 78-145(f) (1983); *Virginia*: Va. Code Ann. § 54-325.2(d)(2) (1950).

3. State "Mature Minor" Statutes:

Alabama: Ala. Code § 22-8-4 (1975); *Arkansas*: Ark. Stat. Ann. § 82-363(g) (1976); *California*: Cal. Civ. Code § 34.6 (West 1982); *Georgia*: Ga. Code Ann. § 31-17-7 (1985); *Idaho*: Idaho Code § 394302 (1985), (1976); *Mississippi*: Miss. Code Ann. § 41-41-3(h) (Supp. 1986); *Montana*: Mont. Code. Ann. § 41-1-402 (1985); *New Jersey*: N.J. Stat. Ann. § 9:17A-1 (West 1976); *Pennsylvania*: Pa. Stat. Ann. tit. 35, § 10102 (Purdon 1977).

4. State Statutes Permitting Minors To Consent To Medical Treatment For Their Own Children:

Alabama: Ala. Code § 22-8-5 (1984); *Alaska*: Alaska Stat. § 09.65.100(3) (1983); *Arkansas*: Ark. Stat. Ann. § 82363(b) (1976); *Connecticut*: Conn. Gen Stat. Ann. § 19a-285(a) (West 1986); *Delaware*: Del. Code Ann. tit. 13, § 707 (1974); *Florida*: Fla. Stat. Ann. § 743.065(2) (West 1986); *Georgia*: Ga. Code Ann. § 31-9-2 (2) (1985); *Illinois*: Ill. Ann. Stat. ch. 91, para. 18.2 (Smith-Hurd 1966); *Kansas*: Kan. Stat. Ann. § 38-122 (1981); *Kentucky*: Ky. Rev. Stat. Ann. § 214.185(2) (Baldwin 1986); *Louisiana*: La. Rev. Stat. Ann. § 40:1299.53(b) (West 1977); *Massachusetts*: Mass. Gen. Laws Ann. ch. 112, § 12F (West 1983); *Minnesota*: Minn. Stat. Ann. § 144.342 (West Supp. 1986); *Mississippi*: Miss. Code Ann. § 41-41-3(b) (Supp. 1981); *Missouri*: Mo. Ann. Stat. § 431.061 1(2) (Vernon Supp. 1986); *Nevada*: Nev. Rev. Stat. Ann. § 129.030 (Michie 1986); *New Jersey*: N.J. Stat. Ann. § 9:17A-1 (1976); *New York*: N.Y. Pub. Health Law § 2504(2) (McKinney 1985); *Oklahoma*: Okla. Stat. Ann. tit. 63, § 2602(A)(4) (West 1984); *Pennsylvania*: Pa. Stat. Ann. tit. 35 § 10102 (Purdon 1977); *Rhode Island*: R.I. Gen. Laws § 23-4.6-1 (1985); *Utah*: Utah Code Ann. § 78-14-5(4)(a) (1953).

5. State Statutes Mandating Parental Notification Or Consent:

NOTIFICATION: *Arizona*: Ariz. Rev. Stat. Ann. § 36-2152 (1986); *Idaho*: Idaho Code § 18-609(6) (Supp. 1986); *Illinois*: Ill. Ann. Stat. ch. 38 paras. 81-54.4, 81-64.4 (Smith-Hurd Supp. 1986); *Maryland*: Md. Health-Gen. Code Ann. § 20-102, 103 (1982); *Minnesota*: Minn. Stat. Ann. § 144.343 subd. 6 (West Supp. 1986); *Montana*: Mont. Code Ann. § 5020-107 1985; *Nevada*: Nev. Rev. Stat. Ann. § 44.2 253 (Michie 1986); *Ohio*: Ohio Rev. Code Ann. § 2919.12 (Anderson Supp. 1985); *Utah*: Utah Code Ann. § 767-304 (1978); *West Virginia*: W. Va. Code § 16-2F-3(a) (1985).
CONSENT: *Indiana*: Ind. Code Ann. § 35-1-58.5-2.5 (1983); *Kentucky*: Ky. Rev. Stat. Ann. § 589 (1986); *Louisiana*: La. Rev. Stat. Ann. § 40:1299-35.5 (West Supp. 1986); *Massachusetts*: Mass. Gen. Laws Ann. Ch. 112, § 125 (West 1983); *Mississippi*: Mississippi Laws 1986, Leg. Sess. Ch. 448; *Missouri*: Mo. Ann. Stat. § 188.028 (Vernon 1983); *North Dakota*: N.D. Cent. Code § 14-02.1-03.1 (1981); *Pennsylvania*: 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); *Rhode Island*: R.I. Gen. Laws § 23-4.7-6 (1985); *South Carolina*: S.C. Code Ann. § 44-41-30 (Law Co-op 1976). Eight of these statutes are currently under court injunction: Arizona, Illinois, Nevada, Ohio, Kentucky, Mississippi, Minnesota and Pennsylvania.

AMICUS CURIAE

BRIEF

No. 85-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

—vs.—

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN PUBLIC HEALTH ASSOCIATION, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AND NATIONAL ABORTION FEDERATION IN SUPPORT OF APPELLEES

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INTEREST OF AMICI[1]

The American Public Health Association ("APHA") is a national, nongovernmental organization established in 1872 with the objective of protecting and promoting personal and environmental health. APHA is the largest public health organization in the world, with a membership of 50,000, including fifty-one state and local affiliate organizations.

APHA was the first organization of health professionals in this country to recognize the detrimental consequences of illegality and inaccessibility of abortion to women. Prior to this Court's landmark rulings in 1973, and as early as 1968, APHA supported

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1 All parties have given their consent to the filing of this brief in letters filed with the Clerk of this court.

the principle that abortion should be a matter of choice for all women. Following the decisions of Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973) APHA urged their full implementation in every state in order to make abortion a matter of safe medical practice throughout the nation.

APHA has appeared as amicus in many other important health-related cases before this Court, including Roe v. Wade; Beal v. Doe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979) and City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). This Court extensively quoted APHA's "Standards for Abortion Services" in Roe v. Wade, 410 U.S. at 144-46 and cited APHA's "Recommended Guide for Abortion Services" (Revised 1979) in City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 436-37 (1983).

Planned Parenthood Federation of America, Inc. ("PPFA") is a not-for-profit corporation organized in 1922 and existing under the laws of the State of New York. It is the leading national voluntary public health organization in the field of family planning. PPFA has 186 affiliates in forty-four states and the District of Columbia. These affiliates operate approximately 786 family planning clinics offering services to the public. Forty-seven affiliates offer abortion services. Planned Parenthood affiliates which do not perform abortions offer pregnancy options counseling and referral for abortion services.

The National Abortion Federation ("NAF"), a not-for-profit professional organization, was founded in 1977 and is composed primarily of clinics, ambulatory surgi-centers and physicians providing abortion services. Currently, NAF members, who perform

approximately one half of all abortions obtained in the United States, include 300 providers in 46 states, the District of Columbia, Puerto Rico and Canada. NAF's primary objective is to unite providers of abortion services into a professional community dedicated to quality care. NAF provides professional standards, guidelines, training and education and serves as a clearinghouse for information and advice to abortion-service professionals and the general public.

PRELIMINARY STATEMENT

Amici have particular expertise and interest in the need for, cost of, and availability of health care services including abortion. Therefore, amici submit this brief limited to the issue of the mandatory waiting period which is part of the Illinois Parental

Notification Abortion Act, and the effect of waiting periods on access to and performance of needed abortion services.[2]

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2 The Illinois Parental Notice Abortion Act, Ill. Rev. Stat. Ch. 38, par. 81-64-81-70 (1975) provides in pertinent part:

> "Section 4. Notice required. (a) No person shall perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent of his intention to perform the abortion . . .
>
> (b) If the minor's or incompetent's parents are divorced, or one parent is not available to the person performing the abortion or his agent or the referring physician or his agent in a reasonable time or manner, then notice to the parent with custody or to the parent who is available shall be sufficient. If neither parent nor the legal guardian is available to the person performing the abortion or his agent or the referring physician or his agent within a reasonable time or manner, notice to any adult person standing in loco parentis shall be sufficient.
>
> . . . .
>
> Section 6. Medical emergency exception. The requirements of Section 4 of this Act shall not apply when, in the

Amici respectfully inform the Court

(Footnote 2 continued from previous page)
best medical judgment of the physician on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. A physician who does not comply with Section 4 of this Act by reason of this exception shall certify in writing the medical indications on which his judgment was based.

A report indicating the basis for failure to give notice shall be filed with the Department of Public Health of the State of Illinois on forms prescribed by the Department. . . .

Section 7. Other exceptions. (a) When the parties of this Act have already been notified and those parties accompany the minor or incompetent to the place where the abortion is to be performed, or submit signed notarized statements indicating that they have been notified, the requirements of Section 4 of this Act shall not apply.

. . . .

Section 8. Penalty. Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether the person upon whom the abortion is to be performed is an unemancipated minor or an incompetent, and who intentionally, knowingly, or recklessly fails to conform to any requirement of this Act, is guilty of a

that they are in full agreement with the discussion of the jurisdictional issues contained in appellee's brief. Prior decisions of this Court make clear that any state or local statute or regulation which restricts a minor's access to abortion services by requiring parental consent or notice must provide a "judicial bypass" for mature minors and those minors for whom abortion is in their best interest. City of Akron v. Akron Center

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(Footnote 2 continued from previous page)
Class A misdemeanor.

Failure to provide persons with information pursuant to the requirements of this Act is prima facie evidence of failure to obtain informed consent and of interference with family relations in appropriate civil actions. The law of this State shall not be construed to preclude the award of exemplary damages in any appropriate civil action relevant to violations of this Act. Nothing in this Act shall be construed to limit the common law rights of parents.

[Hereinafter, the statute will be cited by section only.]

for Reproductive Health, Inc., 462 U.S. 416, 439 (1983). The bypass procedure must assure expeditious and confidential appeals. Bellotti v. Baird, 443 U.S. 622, 643-44, 647 (1979). As the Seventh Circuit recognized, the waiting period and the balance of the Illinois statute cannot go into effect unless and until the State provides a complete and constitutionally adequate bypass.

SUMMARY OF ARGUMENT

Because of the "grave and indelible" consequences to teenagers of limiting access to abortion, this Court should continue to apply strict scrutiny to abortion restrictions such as the Illinois law.

The Illinois waiting period, taken in conjunction with the two-parent notice requirement with which it is linked will inevitably delay minors' abortions well beyond 24 hours. Further delays will also be occasioned by the need to arrange a return visit to the abortion provider. All these delays will weigh disproportionately on teenagers who already seek abortions later in pregnancy than adult women. The delays will increase the health risks and cost of abortions and decrease their accessibility because fewer facilities are providing services at later stages of pregnancy. All of these factors add

up to a severe burden on minor women's abortion rights. The statute cannot be shown to further the state's interest in parental consultation. Even if the statute did further that interest to some extent, it is not narrowly tailored to express only the state interest involved and is, therefore, unconstitutional.

The statute is also void for vagueness. The exceptions to notice and the waiting period when parents are not available in a "reasonable time or manner" or where a "medical emergency" requires an "immediate abortion" are so vague is to fail to give physicians and their agents adequate notice of what is required in order to avoid criminal and civil penalties.

ARGUMENT

I.

THE SEVENTH CIRCUIT APPLIED THE PROPER STANDARD OF REVIEW TO THE 24-HOUR WAITING PERIOD

The decision whether to terminate a pregnancy is encompassed by the "right of privacy, grounded in the concept of personal liberty, guaranteed by the Constitution. . ." Akron, 462 U.S. at 419; Roe v. Wade, 410 U.S. 113 (1973). This Court has applied a consistent constitutional standard for judging burdens on the exercise of fundamental rights -- requiring the state to plead and prove a compelling state interest, and that the law or regulation is narrowly drawn to further that interest. Akron, 462 U.S. at 427-28. In the abortion context this Court has required states and localities to prove that laws and regulations which significantly impact upon women's access to abortion be narrowly drawn

and clearly further one of two compelling state interests: protecting the woman's health (which does not become compelling until after the first trimester of pregnancy) or protecting potential life of the fetus (which does not become compelling until viability). Akron, 462 U.S. at 428; Carey v. Population Services International, 431 U.S. 678, 696, n.22 (1977). The Court has consistently struck down abortion statutes and regulations which fail this constitutional test, e.g., Akron, 462 U.S. at 416; Thornburgh v. ACOG, ___ U.S. ___, 106 S.Ct. 2169, 2183-84 (1986); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird 443 U.S. 622 (1979); Colautti v. Franklin, 439 U.S. 377 (1979).

Minor women possess the fundamental right to decide whether to terminate a pregnancy. Bellotti v. Baird 443 U.S. at 633-34; Danforth, 428 U.S. at 74. This Court

has recognized one additional state interest in the context of minors -- protecting the decision-making process of immature minors. Akron, 462 U.S. at 439. However, laws and regulations that burden a minor's access to abortion purportedly in service of this interest must be judged by the same constitutional test as is applied to laws and regulations which purportedly serve the state interests of protecting the woman's health or the potential life of a viable fetus. Danforth, 428 U.S. at 74; Thornburgh v. ACOG, 106 S.Ct. at 2178, 2183-84. The statute must be narrowly drawn so as to serve only the state interest involved.

The Seventh Circuit articulated and applied the proper standard of review in this case, Zbaraz v. Hartigan, 763 F.2d 1532, 1536 (7th Cir. 1985). There is no support in the decisions of this Court for suggestions by

the State of Illinois that abortion regulations which apply only to minors are entitled to a lower level of constitutional scrutiny. Further, the State's contention that the presence of a judicial bypass procedure for mature and best interest minors satisfies constitutional requirements, and thus, permits virtually any burden to be placed on minors who do not use the judicial bypass is absurd.[3] The judicial bypass is meant as a last resort for

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3 "Undue burden" is a constitutional conclusion, not the trigger of judicial scrutiny. A majority of this Court specifically rejected the standard proposed by Illinois in Akron, 462 U.S. at 453-54 (O'Connor, J. dissenting). A significant impact on access to abortion triggers constitutional scrutiny, and laws or regulations which impose burdens will be upheld only if the burden is not undue, that is if the burden is narrowly tailored and promotes the state's interest in the woman's health (after the first trimester), or potential life of a viable fetus or encouraging parental involvement in a minor child's decision to have an abortion. Akron, 462 U.S. at 428, n. 10.

minors who cannot involve their parents; it was never conceived by this Court as a substitute for constitutionally valid laws applicable to minors who consent to parental involvement. Indeed, the Illinois waiver procedure is written as a substitute only for parental notice, not for the waiting period.

This Court's holding that a minor's right to abortion should receive full constitutional protection is based on its recognition that "there are a few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible." Bellotti v. Baird, 443 U.S. 622, 642 (1979). Those consequences include the immediate threat to a teenager's health of pregnancy and childbirth. Fatal complications of pregnancy are 60 percent more likely for a girl under 15 than for a woman 20-24, and 13 percent more likely between the

ages of 15 and 19.[4] "Studies have shown that teenagers have a greater incidence of toxemia, abrupto placentae and cephalopelvic disproportion in pregnancy."[5] And this Court has found that "[t]eenage pregnancies . . . have significant social, medical and economic consequences for both the mother and her child and the State . . . most teenage mothers drop out of school and face a bleak economic future." Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 470 (1981).[6] For young

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4 Alan Guttmacher Institute, 11 Million Teenagers at 23 (1976); Tyrer, Complications of Teenage Pregnancy, 21 Clinical Obstetrics and Gynecology 1135 (1978).

5 Ryan and Schneider, Teenage Obstetric Complications, 21 Clinical Obstetrics and Gynecology 1191 (1978).

6 See generally, National Research Council, Risking the Future, Adolescent Sexuality, Pregnancy and Childbearing (1987) (Hereinafter "NRC Report").

Members of the National Research Council are drawn from the Councils of the

women, the need for abortion services is, therefore, most acute and the consequences of inability to obtain the services is often most tragic.[7]

(Footnote 6 continued from previous page)
National Academy of Sciences, the National Academy of Engineering and the Institute of Medicine. In 1983, the National Research Council established a study panel on adolescent pregnancy and childbearing. Over a two-year period the panel, its staff and consultants reviewed and assessed available research and data on, inter alia, teenage sexual and fertility behavior and the consequences of early pregnancy and childbearing.

7 Amici do not suggest that all teenage pregnancies ought to be terminated. "Recent studies indicate that good prenatal care and attention to the psychosocial and economic problems of pregnancy reduced perinatal death and complication rates for pregnant teenagers." Ryan and Schneider, supra, note 5 at 1191. For those teenagers who wanted but could not obtain abortion services such good prenatal care and concern is not likely, however.

This Court should therefore affirm the Seventh Circuit and follow its own precedents in applying the strictest scrutiny to limitations on minors' abortion rights.

II.

THE MANDATORY POST-NOTIFICATION WAITING PERIOD OF THE ILLINOIS STATUTE UNCONSTITUTIONALLY BURDENS THE RIGHT OF A MINOR WOMAN TO TERMINATE AN UNWANTED PREGNANCY

The waiting period will result in significant delays and have serious health consequences to minor women. In Akron, this Court recognized the burden imposed on women seeking abortions by a mandatory waiting period. 462 U.S. at 449-51. Considering a 24-hour waiting period that applied to all women -- including minors -- the Court found that an inflexible mandatory waiting period increases the cost of obtaining an abortion, creates scheduling problems which in turn lead to delays of longer than 24 hours, and thus increases the medical risks of abortion. Id. at 450. The Court's finding in Akron that there is no medical justification for a mandatory waiting period that applies to all

women is equally true when the waiting period applies to minor women only. Indeed, since delay in seeking medical intervention in any pregnancy is already a significant problem for teenagers and many teenagers have special health problems resulting from unwanted pregnancy, any additional delay occasioned by a mandatory waiting period will have severe health consequences, see pp. 31-37, infra, placing a heavy burden on their constitutional rights. Zbaraz v. Hartigan, 763 F.2d at 1537; Indiana Planned Parenthood v. Pearson, 716 F.2d 1127, 1143 (7th Cir. 1983.)

A. The Actual Delay Will Far Exceed 24 Hours.

1. The 24-hour waiting period exacerbates the delays caused by the parental notice requirement.

The actual delay occasioned by operation of the statute will inevitably be longer than 24 hours. A prime cause for this extended delay is the fact that the waiting period in the Illinois statute operates in conjunction with a two-parent notice requirement.

The statutory waiting period does not begin to run until both parents are notified. (Section 4).[8] In order, therefore, for the waiting period truly to be confined to 24 hours, both parents would have to be available to the physician or his agent on the

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8 In contrast, under the Akron Ordinance the waiting period ran from the time the woman signed the consent form.

first attempt at contact (assuming notice is given by phone on a weekday and both facility and physician are available the following day).[9] Even in intact families, where a minor has no objection to telling her parents, modern realities of work, travel and family life make that scenario unlikely. Nor does the statute make an exception for the absence of parents caused by such situations as hospitalization, incarceration or service in the Armed Forces.[10]

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9 See pp. 25-30, infra, for discussion of the problems of scheduling the return visit.

10 As discussed more fully, infra, the statutory exception for parents not available "in a reasonable time and a reasonable manner" is too vague to give providers assurance that these situations are covered.

Significant numbers of families are not intact, however.[11] While purporting to accommodate the facts of formal divorce or incest (Sections 4, 7), the statute fails to provide an exception to notice for women whose parents are separated or never married, or if one parent has deserted the family. Locating such absent parents can only add to the delay.

Even when location of parents is not a problem, minors may delay seeking abortions because of the intrafamlial problem they know notification of both parents will cause. Communication within separated families often is difficult and very stressful. See, e.g., Hodgson v. Minnesota, No. 3-81 Civ. 538 slip.

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11 Since World War II, the proportion of children under 18 living in a female headed (single parent) household rose from 11 to nearly 20 percent. The causes include separation, out-of-wedlock births and desertions as well as formal divorce. NRC Report, supra note 6, at 76-77.

op. at 16 (D. Minn. Nov. 6, 1986). Moreover, there are some parents who, when notified that a daughter wants to obtain an abortion, become physically violent toward the daughter, her mother or other family members. Id. Young women are very sensitive to harming the family unit and often delay seeking medical intervention for unwanted pregnancies for that reason.[12]

The two-parent notice requirement, therefore, will cause stress for the pregnant teenager and present practical problems of

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12 After an extensive evidentiary hearing on the two-parent notification statute in effect for five years in Minnesota, the District Court found specifically that the two-parent requirement had a negative effect on minors who voluntarily consulted with one parent: "the emotional trauma [of choosing to notify the second parent or 'endure' the court bypass procedure] tends to interfere with and burden the parent-child communication the minor voluntarily initiated with the custodial parent." Hodgson v. Minnesota, supra at 16.

administration which will inevitably delay the abortion. Only when this process is completed does the 24-hour waiting period even begin to run.

2. The necessity for two trips to the clinic will cause further delays and increase cost.

Once the onerous two-parent notification requirement is completed, the minor can return to the clinic, but in no less than twenty-four hours, to obtain an abortion. This Court has already recognized that the necessity for this return trip will inevitably stretch waiting periods beyond 24 hours. Akron, 462 U.S. at 449-50. Causes for delay include scheduling difficulties of the woman and the clinic,[13] the need to make travel arrangements and arrange time off from school

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13 Not every clinic has a seven or even five day a week abortion service.

and work. The second trip also necessitates increased costs.[14] Appellant's suggestion that this Court should ignore these burdens because the statute does not explicitly require two trips (Appellant's Brief at 52) is specious. The unrebutted evidence at trial of this case revealed that minors come to an medical facility expecting to obtain an abortion. (Appellee's Brief at ___). If there is a waiting period or a consent or notice requirement, those are explained to the minor woman at the facility, and she is told that she will have to return.

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14 Cost and travel are particular problems for teenagers and these problems are exacerbated by the fact that a disproportionate number of the abortions sought by teenagers are second trimester procedures. Teenagers travel substantial distances -- on an average of 45 miles -- to obtain an abortion. NRC Report, supra note 6, at 103.

Amici find appellant Hartigan's suggestion that the first trip to the facility could be avoided by efficient use of the telephone impractical and antithetical to good medical and counseling practices. First, it is difficult to ascertain a woman's age over the phone. In addition, good medical care requires a physical examination and laboratory tests or ultrasound to confirm pregnancy and establish gestational age.[15] These medical facts, which cannot be obtained over the telephone, must be

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15 National Abortion Federation, Standards for Abortion Care 9 (1987). See also, Planned Parenthood Federation of America, Manual of Medical Standards and Guidelines, Part One-S & G, Section VII-A, page 2, March, 1981. It is not even clear that a physician could satisfy the statute by informing parents of a hypothetical intention to perform an abortion before pregnancy is confirmed. It would, in any case, be unethical for medical professionals to announce an intent to perform an abortion before pregnancy is confirmed or the woman has decided herself what to do.

known before the need for an abortion is confirmed.

More important, however, amici believe in careful, supportive, constructive counseling at facilities to aid all women, in making a decision about an unwanted pregnancy.[16] Counseling by those trained in listening and communication skills, who are also able to explain the medical aspects of the abortion procedure and all alternatives, including carrying the pregnancy to term and keeping the child or placing it for adoption, is especially important for young women facing an unplanned and unwanted pregnancy.[17] Appellant Hartigan's suggestion would require a young woman to make

16 APHA, Recommended Program Guide for Abortion Services (Rev. 1979); 70 Am. J. Public Health 652, 653-54 (1980).

17 Planned Parenthood Federation Of America Manual of Medical Standards and Guidelines, Part One-S & G, Section VII-C. p. 21, January, 1984.

the important decisions to have an abortion and to notify her parents of her decision, on the telephone, in advance of this counseling and before she has even confirmed the fact of her pregnancy, in order to avoid the financial and scheduling burdens of two trips to the clinic.[18] Such pressures would undermine, rather than support, the purpose of improving the quality of the minor's decision-making regarding abortion.

18 Amici strongly support the practice of affording a woman sufficient time to make a thoughtful decision regarding the abortion. In fact, Planned Parenthood Federation of America affiliate abortion providers typically schedule pregnancy testing and counseling on a different day from surgery. However, such practice is not inflexible. Affiliate abortion providers which serve rural populations will typically provide a "same day" service to accommodate woman who must travel far to receive their abortions.

B. The Delay Occasioned By The Statute Will Increase The Costs And Health Risks And Decrease The Accessibility Of Abortion For Minors.

The inordinate delays occasioned by the statute will have a particularly harsh impact on teenagers. Teenagers are already at a disadvantage in their access to abortion services because they delay, more than adult women, seeking those services.[19] The reasons for teens' delay include the irregularity of their menstrual cycles, the denial of the fact

19 See generally, NRC Report, supra note 6, at 114.

of pregnancy, unwillingness to confide in others, as well as the specter of facing parental involvement requirements.[20] The result of this delay is that teenagers are far more likely to seek abortions after the first trimester than adult women. For example, a minor under 15 is nearly three times as likely to obtain a second trimester abortion as a

20 Cates, Abortion for Teenagers in Abortion and Sterilization: Medical and Social Aspects, at 144 (J. Hodgson ed. 1981); American Psychological Association, Adolescent Abortion, Psychological and Legal Issues 57 (Melton ed. 1986). The NRC Report, supra note 6, at 9-10, recently concluded: "Evidence shows that to require minor teenagers to seek parental consent often causes them to delay abortions, with attendant health risks." Notice statutes, like consent statutes, increase the likelihood that a teenager will delay obtaining an abortion, thus increasing the risk to her health. Id. at 194.

woman over 19.[21] Second trimester abortions involve greater medical risks,[22] and higher costs[23] than those performed earlier in pregnancy and fewer facilities provide these services.[24] The need to travel and raise the funds for these abortions weighs particularly heavily on teenagers who lack independent financial resources and the means for

21 Department of Health and Human Services, Centers for Disease Control, Center for Health Promotion and Education, Division of Reproductive Health, Abortion Statistics, 1982-1983 at Table 20 and calculations therefrom (1986 pamphlet). This age group is four times as likely as women over 19 year old to have an abortion at or after 16 weeks of pregnancy. Id.

22 Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260 (1984).

23 Henshaw, Freestanding Abortions in the United States, 16 Family Planning Perspectives 260 (1984).

24 Henshaw, et al., Abortion Services in the United States, 1981 and 1982, 16 Family Planning Perspectives 199, 125 (1984).

independent travel.

The statute will exacerbate these problems because even slight delays within the second trimester can have disproportionate health and financial consequences. Although any delay in obtaining an abortion raises the health risks, the delays are steeper from week to week in the second trimester.[25] Cost differentials follow a similar pattern. While there is little difference between the costs of

25 For example, the death-to-case rate for currettage abortions remains below 1 per 100,000 procedures throughout the first trimester of pregnancy, moves to 1.7 (for dilatation and evacuation abortions) at 13-15 weeks and jumps to 7.6 per 100,000 procedures in the 16-20 week interval. U.S. Dep't of Health and Human Services, Centers for Disease Control, Abortion Surveillance, Annual Summary 1981, 43 Table 22a (1985). The average major complication rate doubles between the 13-14 and 15-16 week interval. Tietze & Henshaw, Induced Abortion, A World Review 1986, 103, Figure 11 (6th ed. 1986). Throughout the second trimester, abortion still remains as safe or safer than childbirth, however. Id. at 110.

abortions at gestational stages within the first trimester, costs rise dramatically as the procedure increases in complexity within the second trimester.[26] Moreover, providers of second trimester abortions generally have varied cut-off points for these services, at 14 or 16 weeks, for example.[27] A slight delay could, therefore, take the teenager beyond the upper gestational limit of her nearest second trimester provider, making a scarce resource even scarcer.

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26 For example, in 1981 the mean cost for an abortion at 10 weeks was $190, at 12 weeks $193, at 14 weeks $263 and at 16 weeks $358. Henshaw, supra note 24, at Table 3. Current data collected by amicus NAF show abortions in the first trimester average $200, from 13-16 weeks, $350 and usually increase $100 per week fo every week thereafter. National Abortion Federation, Economics of Abortion (Pamphlet, November, 1986). Even slight delays in an already late abortion could therefore put an abortion beyond the financial reach of many teenagers.

27 Henshaw et al., supra note 24, at Table 8.

Such a delay can also mean the minor is no longer eligible for a dilatation and evacuation (D & E) abortion, the only second trimester abortion method which is performed in nonhospital facilities.[28] She then must seek a labor induction abortion in a hospital, further constricting the universe of available providers,[29] and raising costs of travel and the abortion itself.[30] In addition, labor induction abortions are more emotionally difficult for

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28 Grimes, Second Trimester Abortions in the United States, 16 Family Planning Perspectives 260, 264 (1984) ("Some skilled physicians perform D & E abortions safely at 24 weeks, while others stop at 16, 18 or 20 weeks.")

29 Henshaw et al., supra note 24, at 123 (in 1982 only 26 percent of non-Catholic short-term general hospitals provided any abortion services at all).

30 Id. at 126 (women who have abortions in hospitals pay 2-4 times as much as in non-hospital settings).

the patient than D & E's[31] and can be more dangerous.[32]

Taken separately, each of these burdens imposes an obstacle in the path of a minor woman seeking an abortion. Added together, these burdens amount to a tremendous hurdle for teenagers, exceeding those experienced by adult women facing a state-imposed waiting period, Akron, 462 U.S. at 450.

31 Kafrissen et al., Midtrimester Abortions, Intra-Amnotic Instillation of Hyperosmolar Urea and Prostaglandin F2 alpha v. Dilatation and Evacuation, 251 J.A.M.A. 916, 919 (1984).

32 Grimes, supra note 22 at 264.

C. The Waiting Period Interferes With Good Medical Practice.

In Akron, this Court recognized and cited with approval the standards of the medical profession which allow women adequate time to consider their abortion decision but do not inflexibly require a delay. Id. at 450, n.43. This standard of practice recognizes "that the time needed for consideration of the decision varies depending on the particular situation of the patient and how much counseling she had received." Id.

Amicus American Public Health Association likewise recognizes that the counseling process should be used to assist decision-making rather than erect barriers:

> "Counseling should serve, when appropriate, to simplify and expedite the provision of abortion services. It should not impose unnecessary medical risk by delaying the obtaining of these services.

Any mandatory waiting period increases the physical risks of the procedure as well as increasing emotional stress for the woman.[33]

Amici submit that those same concerns apply with even greater force when patients are minor women. The best medical practice is to provide counseling and medical treatment to each individual according to her own special needs and circumstances. The Illinois Parental Notice statute does not permit physicians to provide such individualized counseling and treatment.

33 APHA, Recommended Program Guide for Abortion Services (Rev. 1979) at 654. (Emphasis added).

III.

THE MANDATORY WAITING PERIOD DOES NOT FURTHER ANY PERMISSIBLE STATE INTEREST

There is no evidence in this record, or any record, that a mandatory inflexible waiting period is necessary to, or in fact does advance parental consultation and thus leads to a more informed decision by the minor. There is, however, ample evidence from this Court and the medical community, that mandatory waiting periods cause delays beyond the statutory periods and that delays pose a significant risk to health. Akron, 462 U.S. at 450; NRC Report at 194. The burdens placed on minor women in terms of cost, access, and increased risk to health by a mandatory waiting period are clear.

Amici submit that notice and consent requirements do not serve the state's interest because they do not result in significantly higher levels of parental involvement than is

obtained by voluntary communication.[34] As the United States District Court for the District of Minnesota found, mandatory parental communication, such as the Illinois statute does not "enhance[] parent-child communications, or improve[] family communication." Hodgson v. Minnesota, supra, at 26. Indeed, after an extensive factual hearing, the Hodgson court found no factual basis that a parental notification statute

34 National statistics show that most minors notify at least one parent about a pregnancy. Torres, Forrest & Eisman, Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services, 12 Fam. Plan. Persp. 284, 287-90 (1980). Younger adolescents consult with at least one parent even more frequently than older teens. Id. Any legitimate concern the state has in encouraging informed decision-making by minors is met by this voluntary consultation with one parent.

". . . on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity." Id.[35]

At trial the state did not, nor could it, submit evidence that the 24-hour waiting period actually serves a significant state interest in promoting parental consultation. A fortiori, the State of Illinois has not and cannot meet its actual burden of proving that the notice provision is "narrowly tailored" to serve this significant state interest. Akron, 462 U.S. at 428 and n.10.

35 A soon to be published study found similar rates of involvement of at least one parent in a state with a mandatory parental notice law (Minnesota) and a state without such a law (Wisconsin). Blum, et al., The Impact of a Parental Notification Law on Adolescent Abortion Decision-Making. Accepted for publication in 77 Amer. J. Pub. Health, ___ (May/June, 1987).

IV.

THE STATUTE IS NOT NARROWLY TAILORED

Even assuming that the waiting period fosters a state interest in parental involvement, it is not narrowly tailored to effectuate only that interest. Roe v. Wade, 410 U.S. at 163-64. In particular, it fails to make adequate exception for minors whose parents already know about her intention to have an abortion and those who first find out as a result of the statutory notice, but wish no further consultation. The statute's attempt to deal with these situations imposes bureaucratic hurdles which are unnecessarily onerous and, in fact, more burdensome than the waiting period itself. The statute permits a minor and her family to waive the mandatory 24-hour waiting period only if both parents actually accompany their daughter to the place where the abortion is to be performed, or if

both parents submit signed notarized statements that they have been notified and wish to waive the waiting period. (Section 7(a)).

The Seventh Circuit succinctly described the burden -- and thus the constitutional problem -- with the first means of waiver: "[t]he problems of scheduling, travel and expense inherent in a waiting period will increase threefold if a minor's parents are required to make arrangements to accompany her . . ." 763 F.2d at 1538. This Court recognized the seriousness of these exact burdens in Akron, 462 U.S. at 434, 450-51.

Submitting notarized statements in order to waive the mandatory waiting period is likely to take more than 24 hours. Even assuming that it is feasible to prepare statements and have them notarized in less than 24 hours, this "exception" requires the minor -- and her family -- to surrender their

constitutionally protected right to confidentiality or anonymity in order to avoid a mandatory delay. "The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity." Thornburgh v. ACOG, 106 S.Ct. at 2181-82. See also, Bellotti v. Baird, 443 U.S. at 622 (Stevens, J., concurring).

The state has nowhere explained why notification of parents may be effectuated by a mere telephone call but ascertainment of the parents' prior knowledge of the abortion or their desire to waive the waiting period requires such elaborate verification and could not be accomplished as part of the same telephone call. Cf. Federal Election Commission v. Massachusetts Citizens for Life, ___ U.S. ___, 105 S.Ct. 616, 630 (1986) (statute not narrowly tailored and therefore unconstitutional because statutory purpose --

protecting corporate contributors from unauthorized use of their funds -- could have been as easily effectuated by notice to contributors, rather than elaborate bureaucratic requirements of Federal Election Campaign Act.) The Illinois statute, therefore, cannot pass constitutional muster on this basis alone.

V.

THE ILLINOIS PARENTAL NOTICE ACT IS UNCONSTITUTIONALLY VAGUE

It is well settled that statutes which abridge or burden fundamental rights must be drawn narrowly and with precision; that they must provide fair notice of what they permit and proscribe; and that they must provide sufficient guidance to enforcement officials to prevent excessive discretionary, arbitrary or discriminatory enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). See generally, Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). In the abortion context, the Court has held that statutes must afford a physicians broad discretion to treat their patients, and must

not "condition[ ] potential criminal liability on confusing and ambiguous criteria." Colautti v. Franklin, 439 U.S. 379, 394 (1979). The Illinois Parental Notice Act is impermissibly vague under each of those tests.

The Illinois statute requires that notice be given to both parents before the 24-hour waiting period begins to run. The statute permits notice to one parent only if the parents are divorced or if "one parent is not available to the person performing the abortion in a reasonable time and manner . . ." (Section 4(b), emphasis added). The statute provides for both criminal and civil penalties for failure to give notice or failure to wait 24 hours after the notice. (Section 8).

The "reasonable time and manner" language has a "no objective meaning and reflects a fatal level of uncertainty" because "criminal liability is imposed." Akron, 462

U.S. at 451 ("humane and sanitary manner" standard for disposal of fetal remains is impermissibly vague). This vagueness concern is exacerbated by the fact that the conduct being required is communication, not medical practice. Section 4(b) fails to provide adequate notice of what type or degree of effort is required to locate and effect notice on an absent, separated, travelling, disinterested or hostile parent.

The impact of the vague language in the statute is to deter physicians from providing abortion services to minors. The net result of this section of the statute, therefore, is an interference with the medical judgment of physicians and a corresponding decline in the ability of a minor woman to receive the medical guidance to which she is entitled under Roe v. Wade, Danforth and Akron.

The statute permits a physician to avoid the mandatory 24-hour notice only if both parents accompany the minor to the abortion facility, or submit notarized statements, or when "a medical emergency exists that so complicates the pregnancy as to require an immediate abortion." (Section 6).[36] Several vagueness concerns are raised by the "medical emergency" standard. It is unclear when a physician may act. Must the physician find that the woman's life is in imminent danger? Will the risk of a health impairment alone

36 Moreover, when a physician makes the determination that such a medical emergency exists, he is required to file a written report with the Illinois Department of Public Health explaining the medical indications upon which his judgment was based. The clear implication of this reporting requirement is that a physician's medical judgment may be challenged by state regulatory authorities, and if challenged, the physician may be subject to civil or even criminal penalties.

survive a later challenge by the state or parent? Will the fact that the delay means the minor's pregnancy will advance beyond local providers' gestational limits for performing abortions justify an immediate abortion? Will the fact that delay will require the teenager to be hospitalized for a labor induction abortion satisfy the statute? Physicians will have to answer these questions for themselves, facing the risk of civil or even criminal prosecution if their determination is second-guessed by a state health official or parent. As a consequence, physicians are liable to steer wide of the protected zone and interpret the statutory language so as to avoid criminal penalties.

If physicians are compelled to interpret the medical emergency standard to mean that they cannot waive the 24-hour waiting period when an immediate abortion is needed for

a broad range of health reasons, then the statute will, in operation, have an unconstitutional result because it will not permit physicians to exercise the degree of discretion in counseling and treating minor patients that is required under this Court's decisions, Colautti, supra; Danforth, 428 U.S. at 64-65; Doe v. Bolton, 410 U.S. 179 (1973). The state's concern for fostering family communications cannot take precedence over a woman's health. Any statutory waiting period must give way to concerns for a woman's life and health in the same way that the state's other interests, e.g., in the potential life of a viable fetus must give way to the woman's life and health. See Doe v. Bolton, 410 U.S. at 191-92.

This Court has upheld against vagueness attacks statutory language such as "necessary for the preservation of mother's

life or health" and "best clinical judgment . . . [that an abortion is] necessary" precisely because "the contested provisions . . . had been interpreted to allow a physician to make his determination in light of all attendant circumstances -- psychological and emotional as well as physical -- that might be relevant to the well-being of the patient." Colautti v. Franklin, 439 U.S. at 394. See also, United States v. Vuitch, 402 U.S. 62, 69-72 (1971); Doe v. Bolton, 410 U.S. at 191-92.

In contrast, the medical emergency exception of the Illinois statute limits a physician's discretion and does not permit a determination "in light of all attendant circumstances."

The statute "conditions potential criminal liability on confusing and ambiguous criteria" and this "presents serious problems of notice, discriminatory application and chilling effect on constitutional rights." Colautti, 439 U.S. at 394.

CONCLUSION

For all the foregoing reasons, amici respectfully request that the Court affirm the decision of the Seventh Circuit Court of Appeals in this case and hold that the 24-hour waiting period is unconstitutional.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois, his agents and successors; and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois, his agents and successors, and on behalf of all others similarly situated, *Appellants*,

v.

DAVID ZBARAZ, M.D., and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all Illinois physicians performing or desiring to perform abortions, and on behalf of their minor patients desiring abortions, *Appellees*.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

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BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE*

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. APA has more than 60,000 members, including the vast majority of psychologists holding doctoral degrees in the United States. APA's purposes are to advance psychology as a science and profession, and to promote human welfare.

The State concedes that the parental notice and waiting period requirements at issue here are premised upon its express assumptions that "unemancipated minors" are immature and unable to make competent choices concerning pregnancy and abortion. The validity of these crucial legislative assumptions has been tested through empirical research conducted by social scientists concerned about children and adolescents. Much of this research has been conducted by members of APA.

APA offers information the parties' briefs will not fully address, including the results of relevant social science research, which may assist in this Court's resolution of the serious constitutional questions presented.*

SUMMARY OF ARGUMENT

The legislative findings asserted by the State in support of the Parental Notice of Abortion Act of 1983 fail to recognize the individualized approach this Court has taken in assessing the competency of minors and is entirely unsupported by the empirical evidence. Point I. Psychological theory and research uniformly indicate that most adolescents, especially those 15 years of age and older, have, and can exercise, the capacity to under-

* This brief is filed pursuant to Rule 36.2 of the Rules of this Court. The parties have consented to its submission. Their letters of consent are on file with the Clerk of this Court.

stand the risks and benefits of health care procedures, including abortion, can appreciate the consequences of those procedures, and can choose rationally among available alternatives. Point II.

There is also no support for the State's claim that adolescents, especially those seeking abortions, are more psychologically vulnerable than adults. The stress adolescents do experience is due more to unwanted pregnancy than to abortion itself. Any abortion-related psychological consequences are mild and diminish rapidly. Point III.

There is no evidence to support the State's contention that its statute improves parental involvement in the decisionmaking process. Young minors already involve their parents in reproductive decisions. For many minors, however, parental involvement may be harmful. And, the waiting period required by the statute places greater burdens on adolescents than it does on adults. Point IV.

ARGUMENT

I. THE LEGISLATIVE PRESUMPTIONS USED BY THE STATE TO SUPPORT RESTRICTIVE PROVISIONS AFFECTING MINORS' ACCESS TO ABORTIONS FAIL TO ACKNOWLEDGE THE COMPLEXITY OF PRIOR DECISIONS OF THIS COURT.

This appeal concerns the constitutionality of § 4 of the Illinois Parental Notice of Abortion Act of 1983 ["the Act"]. *Ill. Rev. Stat.* ch. 38, ¶ 81-64. With certain exceptions, the Act prohibits a physician from performing an abortion upon an unemancipated minor unless the physician performing the abortion or referring the minor for the abortion has given at least 24-hours actual notice to both parents of the minor's intent to have an abortion.[1] Minors who wish to avoid the notice and waiting period

[1] Illinois considers any person under the age of 18 to be a minor controlled by the Act unless she is "emancipated," *i.e.*, "any minor who is or has been married or has by court order otherwise been freed from the care, custody, and control of her parents." *Ill. Rev. Stat.* ch. 38, ¶ 81-63(a)(b).

provisions are required to petition the appropriate court for their waiver. *Id.* at § 4(c). In *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 449-450 (1983), this Court held unconstitutional a local ordinance prohibiting a physician from performing an abortion on a woman until 24 hours after she signed a consent form. The Court concluded that there was no legitimate justification for imposing this "arbitrary and inflexible waiting period." *Id.* at 450. It is not clear whether that decision applies to minors as well.

In many cases, "the question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible of precise answer." *Carey v. Population Services Int'l*, 431 U.S. 678, 692 (1977). As this case indicates, this complex issue has not yet been resolved. *Amicus* respectfully submits, however, that the Act clearly fails to provide a constitutionally sufficient basis for treating most pregnant adolescents in a manner that would be unconstitutional for adults.

For over a decade, this Court has considered the ability of adolescents to make self-determinative decisions involving access to health care, particularly with regard to contraception and procreation. The first major discussion of these issues occurred in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977),[2] in which the Court explicitly recognized that "the right to privacy in connection with decisions affecting procreation extends to minors as well as to adults." *Id.* at 693. Moreover, it firmly established the principle that "state restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . not present in the case of an adult'." *Id.* (citation omitted).

The Act recites three "compelling" interests (*see Ill. Rev. Stat.* ch. 38, ¶ 81-62(a)), supported by six legislative "facts." *See Ill. Rev. Stat.* ch. 38, ¶ 81-62(b). The "compelling" interests are the following: "Protecting

[2] *See also Bellotti v. Baird (Bellotti I)*, 428 U.S. 132 (1976) and *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

minors against their own immaturity"; "Fostering the family structure and preserving it as a viable social unit"; and "Protecting the rights of parents to rear children who are members of their household." This Court has recognized that these are legitimate state interests when properly applied.[3] But as this brief will demonstrate, the six so-called legislative "facts" lack empirical support, and thus fail to provide any basis to believe that the Act truly advances these state interests. The so-called "facts" are the following:

"Immature minors[4] often lack the ability to make fully informed choices that take account of both immediate and long-range consequences."

"The medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature."

"The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related."

"Parents ordinarily possess information essential to a physician's exercise of his best medical judgment concerning the child."

"Parents who are aware that their minor daughter has had an abortion may better ensure that she receives adequate medical attention after her abortion."

"Parental consultation is usually desirable and in the best interests of the minor."

Amicus acknowledges that these "legislative facts" are loosely based upon opinions written by members of this Court.[5] As *amicus* will show in Points II-IV, however,

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[3] *See, e.g., Bellotti v. Baird (Bellotti II)*, 443 U.S. 622, 637 (1979); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

[4] The terms "immature" and "immaturity" in § 2 are not defined nor do they appear elsewhere in the Act.

[5] *See Bellotti II*, 443 U.S. at 640; *H.L. v. Matheson*, 450 U.S. 398, 408, 411 (1981).

there is little, if any, empirical validity to those asserted facts. Moreover, the Court has not rendered or applied these "facts" in the simplistic fashion of the Act.[6]

The State places principal reliance on the argument that the Act's broad presumption that all adolescents are incompetent to make an abortion decision with the assistance of a physician but without the mandated knowledge of their parents is supported by this Court's prior decisions. This Court has asserted that "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti II*, 443 U.S. at 635. But if this presumption is meant to apply to all minors, *amicus* will demonstrate that it is directly contradicted by empirical findings developed over the past decade, a possibility this Court foresaw: "As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point." *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

Moreover, this Court has recognized the constitutional requirement of a more sophisticated and discriminating treatment of adolescents. Contrary to the absolutist quality of the legislative facts posited by the State, this Court has taken a more individualized approach in assessing the competency and maturity of minors to make

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[6] The obvious echoing by the State of carefully selected bits and pieces of dicta asserted by various members of this Court is analogous to the creation of phonograph records advertised by television pitchmen as comprising the world's most loved classical music. Each of these records reproduces only the most recognizable melody from what was originally a complex, carefully constructed composition. By abstracting only the most familiar and common theme from a much longer piece, listeners are not given the opportunity to apprehend the intricate whole that embeds and informs the popular theme. The purposes and findings section of the Act also lacks the context, counterpoint, and complexity of the entirety of this Court's opinions from which they were extracted.

important decisions, and has rejected a *per se* perception that *all* adolescents are incompetent and immature.[7]

[7] This approach has been taken in both the abortion decisions and in a number of decisions outside the abortion or health care context. In *Fare v. Michael C.*, 442 U.S. 707 (1979), for example, applying such factors as an adolescent's age, experience, education, background, and intelligence, the Court concluded that a 16-year old, who made incriminating statements after his request for his probation officer was refused by the police, had "voluntarily and knowingly waived his Fifth Amendment rights." *Id.* at 727. The Court held that "there was no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be." *Id.* Justice Powell's dissent recognized, as did the majority opinion, the variable maturity and decisionmaking competency of adolescents. In assessing the validity of waiver, Justice Powell observed, each case must be judged on its own merits, including an evaluation of the "minor's age" and "actual maturity." *Id.* at 734 n.4.

Similarly, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court held that it violated the first amendment to statutorily exclude the press and general public from the courtroom during testimony of all victims of sexual offenses under age 18. The Court stated that closure under all circumstances failed to take into account the 16- & 17-year old victims' decision to testify. The Court opted for case-by-case determination of the necessity of closure, including an analysis of the "minor victim's age, psychological maturity and understanding, [and] the desires of the victim." *Id.* at 608.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court held that access to communicative materials could not "be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id.* at 213. In determining whether limitations on such access are legitimate, the Court held that any assessments of adolescents' "capacity for individual choice" must take into account "the age of the minor." *Id.* at 214 n.11. *See Rowan v. United States Post Office*, 397 U.S. 728, 741 (1970) (Brennan, J., concurring) (Court left open question whether federal government could allow parents to prevent all children under age 19 from receiving through the mails all reading materials sent to them).

The concept of "actual maturity" used in *Fare*, *Globe Newspaper Co.*, and *Erznoznik* contrasts sharply with Illinois' presumption that all children, even in late adolescence, are incapable of making life-important decisions intelligently. As *amicus* will argue in Point II, Justice Powell's perception in *Fare* that many adolescents do

This Court's decisions respecting minors' rights to decide whether to have an abortion do not suppose that all adolescents are incompetent to make such "fundamental" decisions. *See Roe v. Wade*, 410 U.S. 113 (1973). In contrast to the State's grossly overbroad assumption that minority status is perfectly correlated with immaturity, this Court has recognized that the legal status of "minority" encompasses wide ranges of age and maturity levels. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976). It is only "immature minors" whom the Court perceives as often, though not always, lacking "the ability to make fully informed choices." *Bellotti II*, 443 U.S. at 640.[8] Indeed, the Court has held that "a blanket determination that *all* minors under the age of 15 are too immature" to make a decision related to procreation is unconstitutional. *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 440 (1983).[9]

Thus, this Court has recognized a constitutional difference between immature and "mature minors," *see Bellotti II*, 443 U.S. at 643-644 and n.23, a difference relevant in determining whether certain adolescents are competent to make procreative decisions without parental or judicial involvement. The "mature minor" doctrine permits a child to consent to medical treatment if he or she is capable of appreciating its nature and consequences.[10] As *amicus* will show, there is substantial

possess intelligent decisionmaking capacity comports with the rich and continually emerging scientific evidence on this subject.

[8] *See Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 490-491 (1983) (the State's interest is limited to "protecting immature minors").

[9] Whether a parental notice requirement can constitutionally apply to "mature minors" is an open question. *H.L. v. Matheson*, 450 U.S. 398, 406 (1981). As Justice Powell observed, the *Matheson* Court left "open the question whether [a parental notification statute] unconstitutionally burdens the right of a mature minor" to an abortion. *Id.* at 414 (Powell, J., concurring).

[10] *See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L. J. 115, 117-120 (1973); *see also H.L. v.*

empirical support for the "undoubted social reality" that "some minors, in some circumstances, have the capacity and need to determine their health care needs without involving their parents." *H.L. v. Matheson*, 450 U.S. 398, 453 (1981) (Marshall, J., dissenting).

Illinois, itself, recognizes that many unemancipated minors are competent to make decisions, including those affecting their own health care. Most significant, under Illinois law, pregnant minors may consent to any "medical or surgical procedure performed by a physician" and "for such purpose . . . is deemed to have the same legal capacity to act and has the same powers and obligations as has a person of legal age." *Ill. Rev. Stat.* ch. 111, ¶ 4501. This statute provides for pregnant minors a legal capacity flatly inconsistent with the presumptions of the Act at issue, and by itself provides a basis for holding the Act unconstitutional.[11]

Similarly, without parental notice or consent, pregnant minors are entitled to birth control services rendered by physicians. *Ill. Rev. Stat.* ch. 111 ½, ¶ 4651. Minors between the ages of 12 and 18 who have contracted venereal disease or suffer from chemical or alcohol dependency may consent to medical care and counseling without prior parental involvement. *Ill. Rev. Stat.*

Matheson, 450 U.S. at 450 n.49 (1981) (Marshall, J., dissenting) and cases cited therein.

[11] Appellants cite only this statute among all others *amicus* discusses and they do so only in an apologetic footnote. Brief for Appellants at 44 n.20. By carving out an exception solely for abortion, the State reveals its intent to burden this medical procedure among all others. Because pregnant minors may consent to all other medical and procreative treatment and many other unemancipated but mature minors may consent to ther forms of treatment, the Act irrationally discriminates against pregnant minors who seek abortions, and irrationally singles out the abortion decision alone as one which pregnant minors are less competent to make. There is no reason to believe pregnant minors are less capable of making the abortion decision with the assistance of a health professional than they are to make decisions regarding other medical and surgical procedures posing far greater risk to the minor's own health and significant potential risk to the fetus.

ch. 111, ¶ 4504. Minors 14 years of age or older may receive outpatient counseling and psychotherapy for five sessions without notice to parents. *Ill. Rev. Stat.* ch. 91 ½ ¶ 3-501. Minors 16 years of age or older may admit themselves for inpatient hospitalization and are to be treated as an adult for such purposes. *Id.* at ¶ 3-502. Illinois' "finding" that minors are incompetent only as to the abortion decision is plainly irrational in the face of these provisions.

Amicus acknowledges that this Court has thus far accommodated the "mature minor" rule by recognizing the right of an adolescent wishing to forego parental notice or consent to petition a court to show "that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes." *Bellotti II*, 443 U.S. at 643. But placing the onus of petitioning the court for relief upon the adolescent unduly burdens her right to choose whether to have an abortion.[12]

This Court has recognized that "[t]he need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require a State to act with particular sensitivity when it legislates to foster parental involvement . . . ." *Bellotti II*, 443 U.S. at 642. By equating lack of emancipation at age 18 with immaturity for all minors, the State fails to act with this constitutionally mandated sensitivity. Imposing the requirements of the Act on all minors is unnecessarily wasteful of both adolescents' and the judiciary's resources. By sweeping within its ambit a large number of mature adolescents as capable of choosing competently and responsibly as adults, as demonstrated by overwhelming and consistent empirical research, the Act is unconstitutional.

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[12] One major problem with the "mature minor" rule, however, is that the definition of maturity remains vague. *See* Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?* 62 NEB. L. REV. 455, 468 (1983). *See Bellotti II*, 443 U.S. at 644 n.23 ("Maturity" is "difficult to define").

The constitutional alternative is to permit mature minors who have the decisionmaking capacity equivalent to adults, to give informed consent to abortions without requiring parental or judicial involvement. This approach will properly place on the State, acting through the physician, the burden of demonstrating tht a particular pregnant adolescent is in that small minority not mature enough to make the abortion decision without parental involvement.[13]

II. OLDER ADOLESCENTS AND MANY YOUNGER ADOLESCENTS ARE AS ABLE AS ADULTS TO MAKE COMPETENT DECISIONS REGARDING ABORTION.

This Court has asserted, as a guiding principle, that:

> [W]hen a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant state policy requires more than a bare assertion, based on a conceded complete absence of supporting evidence, that the burden is connected to such a policy.

Carey v. Population Services Int'l, 431 U.S. 678, 696 (1977).

There is no question that the right to secure an abortion is fundamental. *Roe v. Wade*, 410 U.S. 113 (1973). There is no question that the Act creates a burden for all unemancipated minors that is unconstitutional, at least as applied to adults. *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983). There is also no question that the State provides no empirical support for its legislative finding that all "minor children are not . . . able to make informed and mature choices." Brief for Appellants at 44.[14]

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[13] "[A] minor's very decision to seek an abortion shows deliberation, a sense of responsibility and foresight as to consequences." Dembitz, *The Supreme Court and a Minor's Abortion Decision*, 80 COLUM. L. REV. 1251, 1255-1256 (1980).

[14] The State can gain no comfort from its supporting *amici* in this regard. For example, Brief of *Amici Curiae* Family Research Council *et al.* states, with one citational support, "The ability to reason abstractly and foresee consequences . . . is absent in many teenagers." *Id.* at 32 n.16. The reference is incorrectly cited, and the conclusion drawn by those *amici* is at complete variance with any objective reading of the research literature.

The Court has yet to define precisely what the capacity to make informed choices means.[15] But in the abortion context, it would certainly be unhelpful and unconstitutional to define it in terms of the choice made, *i.e.*, by finding incapable of consent any minor who chooses to have an abortion. Within the contours of *Roe*, abortions are lawful. There are about 1.5 million abortions performed each year,[16] and of approximately 1.1 million teenage pregnancies, about 40% are terminated by abortion.[17] By any objective standard, therefore, the decision to abort is one that a reasonable person, including a reasonable adolescent, could make.[18]

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[15] *But see* 45 C.F.R. Part 46 (DHHS rules regarding consent to biomedical and behavioral research including consent to research with children); Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982); Bersoff, *Children as Research Subjects: Problems of Competency and Consent in* THE RIGHTS OF CHILDREN 186 (J. Henning ed. 1982).

[16] *See* Russo, *Adolescent Abortion: The Epidemiological Context in* ADOLESCENT ABORTION: PSYCHOLOGICAL & LEGAL ISSUES 40-50 (G. Melton, ed. 1986) [hereinafter ADOLESCENT ABORTION] (for convenience of the Court, nine copies of this text published by *amicus* APA have been lodged with the Clerk of the Court); Alan Guttmacher Institute, *School Sex Education in Policy and Practice*, 3 ISSUES IN BRIEF 1 (1983) [hereinafter *AGI*].

[17] NATIONAL ACADEMY OF SCIENCES, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 1, 15, 261 (1987) [hereinafter NAS REPORT]; *AGI*, *supra* note 16.

[18] Thus, any definition of capacity to consent that requires the "capacity for mature judgment concerning the *wisdom of abortion*," *H.L. v. Matheson*, 450 U.S. 398, 408 (emphasis added), is misplaced. *See* Smetana, *Reasoning in the Personal and Moral Domains: Adolescent and Young Women's Decision-making Regarding Abortions*, 2 J. APPLIED DEV. PSYCHOLOGY 211 (1981). Only the capacity for mature judgment concerning the wisdom of abortion in the particular individual's circumstances is required. This cannot be judged solely on the decision she has made.

This Court has eschewed a definition of capacity to consent that focuses on the choice made, focusing instead on the individual's cognitive capacity to make the decision to abort, *i.e.*, the ability to understand the nature of the procedure, its risks, benefits, consequences, and possible alternatives. Perhaps the most complete statement of this Court's position on competency appears in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 104 (1976) (Stevens, J., concurring in part and dissenting in part):

> The Court assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure and of appreciating its consequences and those of available alternatives.[19] This assumption is, of course, correct and consistent with the predicate which underlies all state legislation seeking to protect minors from the consequences of decisions they are not yet prepared to make.[20]

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[19] *See also Bellotti II*, 443 U.S. at 640 ("ability to . . . take account of both immediate and long-range consequences").

[20] Another of the Court's concerns, that the minor be "well enough informed to make her abortion decision," *Bellotti II*, 443 U.S. at 643, is not so much a component of the adolescent's competency but of the physician's legal and ethical duty to provide all material information to the patient. *See* Wadlington, *Consent to Medical Care for Minors: The Legal Framework in* CHILDREN'S COMPETENCE TO CONSENT 57 (G. Melton, G. Koocher & M. Saks eds. 1983) [hereinafter CHILDREN'S COMPETENCE]. Another concern is that adolescents be able "to recognize ethical, qualified physicians," *Bellotti II*, 443 U.S. at 641 n.21, and thereby "obtain adequate counsel and support." *Planned Parenthood of Cent. Mo.*, 428 U.S. 52, 91 (Stewart, J., concurring). However, physicians licensed by the State and permitted to practice should be presumed competent and qualified to perform abortions in an ethical manner. *Cf. Youngberg v. Romeo*, 457 U.S. 307, 323 (1982) ("the decision, if made by a professional, is presumptively valid"). Furthermore, "all [abortion] clinics make abortion counseling available on request; such counseling generally consists of describing the procedure and explaining its risks, obtaining informed consent, and confirming that it was the patient's own decision to have the procedure." NAS REPORT, *supra* note 17, at 191-192. Finally, the Court has stated that parents may provide medical information their daughters cannot. But, minors are as able to give accurate health histories as their parents. McKinney, Chin, Reinhart & Trierwiller, *Health Values in Early Adolescence*, 14 J. CLIN. CHILD PSYCHOLOGY 315 (1985).

Whether adolescents possess the requisite capacity to consent under this formulation is an empirical question, and significant and substantial evidence developed by social scientists bears directly on that question. As *amicus* will describe, that literature shows that there is no empirical justification for the special and anomalous burden the State has imposed on all unemancipated minors seeking abortion. In the light most favorable to the State, the data support the imposition of this burden on only a small fraction of such adolescents. Thus, the Act fails to select means that are "narrowly drawn," *Roe v. Wade*, 410 U.S. 113, 155 (1973), in support of whatever legitimate interests Illinois may have in protecting those few minors who are not competent, in consultation with their physicians, to decide whether to abort.

A. Psychological Theory About Cognitive, Social, and Moral Development Strongly Supports the Conclusion That Most Adolescents Are Competent to Make Informed Decisions About Abortion.

Developmental psychologists[21] have generated well-established and generally accepted theories concerning adolescents' capacities for understanding and reasoning as part of the process of decisionmaking, especially in comparison to the same capacities in adults. Cognitive capacity develops in a predictable sequence of stages, from simple reflexive reactions in infancy to the comprehension of abstractions and future consequences in early adolescence.[22] The ability to comprehend future conse-

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[21] Developmental psychologists are scientists who study cognitive, personality, and emotional development along the life span of individuals.

[22] Jean Piaget is credited with documenting this growth and providing the nomenclature for these stages. *See* B. INHELDER & J. PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD

quences, called "formal operations," is most relevant to the decisions affected by the Act.

The cognitive ability developed in the period of formal operations is most closely akin to the "capacity to consent." In the period of formal operations children acquire the capacity to generate many possible solutions to a problem, to think about each possible solution hypothetically, to imagine its consequences before they occur, to consider both immediate and longer-range consequences, and to weigh and balance these various potential outcomes to reach a conclusion about the decision to be made. Once the period of formal operations is complete, an individual has the decisionmaking abilities of an adult.

In early adolescence (10-13) children move from the period in which they learn to organize their environment coherently and conceptually to the period of formal operations. By the onset of late adolescence (14-17), almost all minors with at least average intellectual ability possess the capacity for formal operations that characterizes the problem-solving process of adults. *See* Keating, *Thinking Processes in Adolescence in* HANDBOOK OF ADOLESCENT PSYCHOLOGY 211 (J. Adelson ed. 1980) and n.22, *supra*. A large body of empirical research supports these principles.[23]

In addition to reaching the stage of formal operations, competent decisionmaking is dependent on social development and situational factors such as the emerging of one's identity, establishing autonomy, and forming personal values, processes that continue through early and late adolescence.[24] One might speculate that the need to estab-

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TO ADOLESCENCE (1958); *see generally* J. FLAVELL, THE DEVELOPMENTAL PSYCHOLOGY OF JEAN PIAGET (1963).

[23] *See, e.g.*, Flavell, *An Analysis of Cognitive-Developmental Sequences*, 86 GENETIC PSYCHOLOGY MONOGRAPHS 279 (1972); Neimark & Lewis, *Development of Logical Problem Solving*, 29 CHILD DEV. 527 (1968); Elkind, *Conceptual Orientation Shifts in Children and Adolescents*, 37 CHILD DEV. 493 (1966).

[24] *See generally* P. MUSSEN, J. CONGER, & J. KAGAN, CHILD DEVELOPMENT AND PERSONALITY (1974); TWELVE TO SIXTEEN (J. Kagan & R. Coles eds. 1972).

lish a separate identity and autonomy from parents might, at times, cause adolescents to make decisions based on their need to demonstrate independence from parental values rather than on the appreciation of objective consequences. The evidence suggests, to the contrary, that the majority of adolescents do not repudiate parental values during their search for autonomy.[25]

To the extent that many decisions require the weighing of the moral consequences of options, moral development is another important factor in competent decisionmaking. Psychological theory and empirical research on adolescents' moral development reaches virtually the same conclusions as found in cognitive development. Early adolescence is marked by emergence of the adult's capacity to form moral principles against which to judge one's behavior and decisions, and this capacity is fully developed by ages 14-15. *See generally* Kohlberg, *The Development of Children's Orientations Toward Moral Order*, 6 VITA HUMANA 11 (1963).

Thus, it is now generally accepted that by mid-adolescence (14-15) the great majority of adolescents do not differ from adults in their capacities to understand and reason about medical and psychological treatment alternatives, or in their abilities to comprehend and consider risks and benefits regarding treatment alternatives.[26]

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[25] *See* Conger, *A World They Never Knew: The Family and Social Change in* TWELVE TO SIXTEEN 197 (J. Kagan & R. Coles eds. 1972); Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385 (1963).

[26] *See, e.g.*, Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in* ADOLESCENT ABORTION, *supra* note 16, at 1; Weithorn, *Children's Capacities in Legal Contexts in* CHILDREN, MENTAL HEALTH, AND THE LAW 25 (N. Reppucci & Assoc. eds. 1984); Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445 (1984); Grodin & Alpert, *Informed Consent and Pediatric Care in* CHILDREN'S COMPETENCE, *supra* note 20, at 93; Weithorn, *Developmental Factors and Competence to Make Informed Treatment Decisions in* LEGAL REFORMS AFFECTING CHILD AND YOUTH SERVICES 85 (G. Melton ed. 1982);

B. Research Confirms that Most Adolescents Have the Capacity to Make Sound Health Care Decisions, Including Decisions About Abortion.

Extensive empirical literature demonstrates that adolescents' actual decisionmaking performance when faced with various types of real-life practical problems involving treatment and non-treatment decisions accords with the principles and theories discussed in Point II (A). Many of these studies compare the performance of adolescents to that of adults in making such decisions.[27]

Wald, *Children's Rights: A Framework for Analysis*, 12 U.C.D. L. REV. 255 (1979); Ferguson, *The Competence and Freedom of Children to Make Choices Regarding Participation in Research: A Statement*, 34 J. SOC. ISSUES 114 (1978); Grisso & Vierling, *Minors' Consent to Treatment: A Developmental Perspective*, 9 PROF. PSYCHOLOGY 412 (1978); Schowalter, *The Minor's Role in Consent for Mental Health Treatment*, 17 J. AM. ACAD. CHILD PSYCHIATRY 505 (1978).

Not all older adolescents and not all adults reach the highest levels of decisionmaking capacity, *see* Roth, Meisel, & Lidz, *Tests of Competence to Consent to Treatment*, 135 AM. J. PSYCHIATRY 279 (1977), but the capacities of the two groups are equivalent. In the face of this equivalency, any burden that is "arbitrary and inflexible" for adults would be unjust for the great majority of adolescents seeking abortions as well. *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. at 450 (1983); *see Carey*, 431 U.S. at 693 (1977).

[27] In addition to the studies cited or discussed in *supra*, note 26, *see, e.g.*, Adelman, Lusk, Alvarez & Acosta, *Competence of Minors to Understand, Evaluate, and Communicate about their Psychoeducational Problems*, 16 PROF. PSYCHOLOGY 426 (1985); Taylor, Adelman & Kaser-Boyd, *Exploring Minors' Reluctance and Dissatisfaction with Psychotherapy*, 16 PROF. PSYCHOLOGY 418 (1985); Kaser-Boyd, Adelman & Taylor, *Minors' Ability to Identify Risks and Benefits of Therapy*, 16 PROF. PSYCHOLOGY 411 (1985); Bastian & Adelman, *Noncompulsory versus Legally Mandated Placement, Perceived Choice, and Response to Treatment among Adolescents*, 52 J. CONSULTING & CLIN. PSYCHOLOGY 171 (1984); Kaecher, *Competence to Consent: Psychotherapy in* CHILDREN'S COMPETENCE, *supra* note 20, at 11; Lewis, *Decision Making Related to Health in* CHILDREN'S COMPETENCE, *supra* note 20, at 75; Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 CHILD DEV. 538 (1981); Melton, *Effects*

For example, 14-year old minors and adults were presented with four vignettes about individuals suffering from particular medical or psychological disorders. They were presented with detailed information about the nature, purpose, risks and benefits of the alternative treatments, and were asked to choose among them. The participants were then asked a series of standardized questions about their decisions. In most instances, the responses showed no difference between the adults and the 14-year-olds on any of the scales of competency used in the study—factual understanding, inferential understanding (appreciation), reasoning, choice of reasonable option, and evidence of choice. Weithorn & Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 CHILD DEV. 1589 (1982).[28]

The most directly relevant study examined pregnant minors' and adults' decisionmaking in an actual treatment setting. Lewis, *A Comparison of Minors and Adults' Pregnancy Decisions*, 50 AM. J. ORTHOPSYCHIATRY 446 (1980). In this study, 16 unmarried adolescents, ages 13-17, and 26 unmarried adult women, ages 18-25, were asked to consider their options for responding to their own pregnancies at the time of their pregnancy tests. Standardized questions were used to determine their knowledge of pregnancy-related laws, sources of advice

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of a State Law Permitting Minors to Consent to Psychotherapy, 12 PROF. PSYCHOLOGY 647 (1981); Melton, *Children's Participation in Treatment Planning: Psychological and Legal Issues*, 12 PROF. PSYCHOLOGY 246 (1981); Roberts, Beidelman & Wurtele, *Children's Perception of Medical and Psychological Disorders in their Peers*, 10 J. CLIN. CHILD PSYCHOLOGY 76 (1981); Dollinger, Thelen & Walsh, *Children's Conception of Psychological Problems*, 9 J. CLIN. CHILD PSYCHOLOGY 191 (1980); Neuhauser, Amsterdam, Hines & Steward, *Children's Concepts of Healing: Cognitive Development and Locus of Control Factors*, 48 AM. J. ORTHOPSYCHIATRY 335 (1978).

[28] For confirming studies, *see* Belter & Grisso, *Children's Recognition of Rights Violations in Counseling*, 15 *Prof. Psychology* 899 (1984). *Cf.* T. GRISSO, JUVENILES' WAIVER OF RIGHTS (1981); Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134 (1980).

they had received or expected to seek, the range of factors one could consider in making choices about one's pregnancy, and the reasons for their own choices.

The study revealed no statistically significant differences between the unmarried minors and adults in knowledge of pregnancy-related laws or in their choices. Nineteen percent of minors and 23% of adults planned to carry to term. Further, when asked to describe factors that could affect one's choice of abortion or motherhood, minors differed very little from adults in the frequency with which they mentioned various considerations and consequences. There were no significant differences on such factors as the positive emotions associated with mothering, financial concerns, effect of given choices on ones' life-goals or present life-style, or social stigma. In general, "minors equaled adults in their 'competence' to imagine the various ramifications of the pregnancy decision." *Id. See* Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84 (1987).

In sum, empirical studies have found few differences between minors aged 14-18 and adults in their understanding of information and their ability to think of options and consequences when asked to consider treatment-related decisions. These unvarying and highly significant findings indicate that with respect to the capacity to understand and reason logically, there is no qualitative or quantitative difference between minors in mid-adolescence, *i.e.*, about 14-15 years of age, and adults.[29]

III. THERE IS NO SUPPORT FOR THE STATE'S PRESUMPTION THAT ADOLESCENTS ARE MORE PSYCHOLOGICALLY VULNERABLE THAN ADULTS.

The State asserts that "state imposed restrictions on the activities of children are justified by children's special vulnerability." Brief for Appellants at 44. Insofar as

[29] Moreover, progressively increasing numbers of younger adolescents demonstrate such capacities as they proceed through the developmental transition typical of ages 11-14.

the State's premise applies to most adolescents, it is demonstrably incorrect.

A. Adolescence is Not a Particularly Difficult Stage of Development.

Early views of adolescence as a time of tumult and rebellion have been challenged by contemporary developmental psychology. Most people pass uneventful and relatively peaceful adolescent years. E. DOUVAN & J. ADELSON, THE ADOLESCENT EXPERIENCE (1966). Though there are developmental challenges adolescents must meet, these are not different in number or severity than the challenges confronting individuals at other times in the life course. H. BEE, THE JOURNEY OF ADULTHOOD (1987).

It might be supposed that although adolescents in general are not especially psychologically vulnerable, those who engage in early sexual activity and who become pregnant are "acting out" their emotional difficulties or "rebelling" against their parents. There is, however, no support for this claim. First, a majority of individuals become sexually active during adolescence. Marecek, *Counseling Adolescents with Problem Pregnancies*, 42 AM. PSYCHOLOGIST 89 (1987). Second, early sexual experience is not a form of rebellion. In a study comparing sexually active and nonactive adolescents, both groups had similar perceptions of their parents' level of discipline and similar positive feelings toward their parents, although the sexually active group perceived their parents as more sexually liberal. Cvetkovich & Grote, *Adolescent Development and Teenage Fertility in* ADOLESCENTS, SEX, AND CONTRACEPTION 109 (D. Byrne & W. Fisher eds. 1983). Third, 40% of today's 20-year-old women have had at least one pregnancy during their teen years. Russo, *Adolescent Abortion: The Epidemiological Context in* ADOLESCENT ABORTION, *supra* note 16, at 63.

Another erroneous supposition is that adolescents seeking abortions are drawn from an especially psychologically or emotionally vulnerable subpopulation. However, unmarried adolescents who seek abortions are similar in

psychological makeup to other adolescents. Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 AM. J. ORTHOPSYCHIATRY, 432, 436 (1980). Moreover, compared to unmarried adolescents who choose to carry to term, those seeking abortions are likely to be somewhat advantaged in terms of social class status, family background, and academic achievement. *Id.* Adolescents who seek abortions, compared to those who choose motherhood, are characterized by a number of traits associated with positive mental health and superior psychological maturity—greater independence, higher academic motivation and aspiration, and more feelings of competence and optimism. *Id.* Thus, not only is it untrue that as a group adolescents who choose abortions are at special psychological risk, but the opposite is actually correct.

B. Much of the Stress Pregnant Adolescents Experience is Due to Unwanted Pregnancy, Not to Abortion Itself.

The evidence does not support this Court's assertion that there are "potentially grave emotional and psychological consequences of the decision to abort." *H.L. v. Matheson*, 450 U.S. 398, 412 (1980).[30] Three major reviews of the psychological and psychiatric research literature all confirm that for most women who undergo abortion, there are no long-term negative emotional effects.[31]

When women experience regret, depression, or guilt, such feelings are mild and diminish rapidly. Adler &

[30] The State cites this statement, as well, but without empirical support. Brief for Appellants at 47. Only the State's supporting *amicus*, *see* Brief Amicus Curiae of American Victims of Abortion at Appendix, cites some literature that allegedly substantiates this premise, but its abstractions of "major findings" completely distort the extant research.

[31] Marecek, *Consequences of Adolescent Childbearing and Abortion in* ADOLESCENT ABORTION, *supra* note 16, at 96; Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in* ADOLESCENT ABORTION, *supra* note 16, at 74; Shusterman, *The Psychosocial Factors of the Abortion Experience: A Critical Review*, 1 PSYCHOLOGY OF WOMEN Q. 79 (1976) [hereinafter *Shusterman*].

Dolcini, *Psychological Issues in Abortions for Adolescents in* ADOLESCENT ABORTION, *supra* note 16, at 84. When serious problems do occur, they are most likely to occur among women with prior histories of psychiatric problems. *Id.*[32] With respect to adolescents, abortion "is neither psychologically harmful nor in other ways damaging to the patient." Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 AM. J. ORTHOPSYCHIATRY 432, 440 (1980). "Very few teenagers have severe psychiatric complications after induced abortion." Cates, *Adolescent Abortions in the United States*, 1 J. ADOL. HEALTH CARE 18, 22 (1980).[33]

Abortion not only carries a low risk of negative psychological consequences for adolescents, but the psychological sequelae of abortion are usually positive, with significant diminution of anxiety and increased feelings of well-being. "The predominant response following abortion is generally relief." Adler & Dolcini, *Psychological Issues in Abortions for Adolescents in* ADOLESCENT ABORTION, *supra* note 16, at 84 (and references cited therein). Generally, studies of the mental health status of pregnant women before and after abortion show significant reductions in the symptoms of stress, as measured by standardized psychological tests.[34]

The abortion removes serious potential constraints on the minor's life and future. After an abortion, the adolescent can resume her normal life and activities in school, at home, and with peers. In contrast, "adolescent mothers are significantly more likely to curtail their

[32] *See* NAS REPORT, *supra* note 17, at 195.

[33] *See* C. CHILMAN (ed.), ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY (NIH Pub. No. 79-1426) (1978); Bracken, Hackamovitch & Grossman, *The Decision to Abort and Psychological Sequelae*, 158 J. NERV. MENT. DISORDERS 154 (1974); *see also* David, Rasmussen & Holst, *Postpartum and Postabortion Psychotic Reactions*, 13 FAM. PLAN. PERSP. 88 (1981) (only 11.4 psychiatric admissions per 10,000 abortions). *See generally* NAS REPORT, *supra* note 17, at 195-196.

[34] *Shusterman*, *supra* note 31.

education, to be relegated to low-paying jobs, to be single parents, and to be on welfare," NAS REPORT, *supra* note 17, at 18, as well as to experience repeat pregnancies and, for those who marry to legitimate the birth, greater marital instability. Marecek, *Consequences of Adolescent Childbearing and Abortion in* ADOLESCENT ABORTION, *supra* note 16, at 96.[35]

IV. THE STATE'S MANDATORY NOTICE AND WAITING PERIOD SERVE NO LEGITIMATE STATE INTERESTS AND MAY ACTUALLY BE HARMFUL TO THE OSTENSIBLE GOALS OF THE ACT.

In addition to erroneously asserting that the Act serves the State's interest in protecting minors against incompetent decisionmaking, the State reasons that the Act will encourage parental participation and reduce the risks of the abortion decision, as it perceives them. Brief for Appellants at 37-49. As before, the research completely contradicts this claim.

A. A Great Many Young Minors and Many Older Minors Voluntarily Inform Their Parents of the Desire to Have an Abortion.

Those minors most likely in need of adult counsel generally consult their parents about their pregnancies, regardless of legal mandates. Young adolescents (ages 11-14) typically involve their parents in reproductive decisions, even in those States without a parental notification requirement.

Approximately three-fourths of minors aged 15 or younger inform their parents before they obtain an abortion,[36] and 25% of this group report that their parents

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[35] Regardless of one's moral position on abortion itself, and *amicus* takes none herein, the data discussed in Point III strongly support the position that abortion is more benign than carrying to term for almost all adolescents.

[36] Torres, Forrest & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 287-290 (1980) [hereinafter *Telling Parents*]. *See also* Mnookin, Bellotti v. Baird: *A Hard Case in* IN THE

suggested the abortion.[37] In States requiring that minors either inform parents or obtain their consent prior to obtaining an abortion, young adolescents rarely use judicial bypass procedures.[38]

Minors who are unusually ambivalent about the decision and who perceive themselves as relatively incompetent decisionmakers also are likely to involve their parents in an abortion decision. *Rosen, supra* note 36, at 48. Even older minors often consult their parents about the abortion decision though this does not occur as frequently as among young adolescents. Indeed, it is a long-established fact that adolescents often seek the advice of their parents about non-trivial decisions.[39]

INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY, 149, 240-241 (R. Mnookin ed. 1985) [hereinafter *Mnookin*]; Clary, *Minor Women Obtaining Abortions: A Study of Parental Notification in a Metropolitan Area*, 72 AM J. PUB. HEALTH, 283, 284 (1982) [hereinafter *Clary*]; Rosen, *Adolescent Pregnancy Decision-making: Are Parents Important?* 15 ADOLESCENCE 44 (1980) (57% of 432 pregnant adolescents under age 18 in State without parental notification or consent statute consulted their parents about abortion decision) [hereinafter *Rosen*].

[37] *Telling Parents, supra* note 36, at 290. "Among very young teenagers, it appears that parents have a major influence on the decision to terminate a pregnancy." NAS REPORT, *supra* note 17, at 113. But only 8% of 17 year olds who obtain abortions report that they did so at their parents suggestion. *Telling Parents, supra* note 36, at 290.

[38] Nearly 90% of minors who use judicial bypass procedures are aged 16-17. Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-authorized Abortions*, 15 FAM. PLAN. PERSP. 259, 261 (1983) [hereinafter *Judging Teenagers*].

[39] In fact, the proportion of minors who decide, without parental consultation, to carry to term is similar to the proportion who decide to seek an abortion without parental consultation. *Rosen, supra* note 36, at 46. *See, e.g.*, Brittain, *Adolescent Choices and Parent-Peer Cross-Pressures*, 28 AM. SOC. REV. 385 (1963).

B. State Mandated Parental Consultation is Unlikely to Result in Positive Communication or Better Reasoned Decisionmaking and May Be Harmful to Adolescents Who Cannot or Will Not Use the Judicial Bypass Option.

It is well-known that, in general, parents are only minimally involved in adolescents' development of sexual knowledge. This indicates that attempts by the State to compel parental consultation in minors' abortion decisions is unlikely to result in better reasoned decisions. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?* 62 NEB. L. REV. 455, 470-471 (1983).[40] Failures in family communication about sexuality are likely to be exacerbated when a teenager announces her pregnancy. Such an announcement typically evokes an initial response of anger and disappointment and triggers a crisis in the family.[41]

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[40] The usual absence of parent-daughter discussions about sexual matters does not necessarily suggest parental neglect. Adolescents' substantial discomfort in initiating or participating in such discussions, *see* Fox & Inazu, *Mother-Daughter Communication About Sex*, 29 FAM. REL. 347 (1980), reflects, in part, a developmentally appropriate concern with privacy. The protection of privacy and the maintenance of control over personal information in sexual matters is an especially important concern of adolescent females. *See* Melton, *Decision Making by Children: Psychological Risks and Benefits in* CHILDREN'S COMPETENCE, *supra* note 20, at 21; Parke & Swain, *Children's Privacy in the Home: Developmental, Ecological, and Child-Rearing Determinants*, 11 ENV'T. & BEHAV. 87 (1979); Wolfe, *Childhood and Privacy in* CHILDREN AND THE ENVIRONMENT 175 (I. Altman & J. Wohlwill eds. 1978); Laufer & Wolfe, *Privacy as a Concept and a Social Issue*, 33(3) J. SOC. ISSUES 22 (1977). Assertion of privacy is a mark of maturity and psychological adaptation among adolescents. *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986) [not yet published, *see* No. 3-81 CIV 538, slip op. at 24 (D. Minn. Nov. 6, 1986)], *appeal docketed*, No. 86-5423 (8th Cir. Nov. 18, 1986). Depriving an adolescent female of autonomy in making the abortion decision often imposes far more stress on her than does making the decision itself or undergoing the medical procedure. *Id.* at 14.

[41] *See, e.g.*, Osofsky & Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 CLIN. OBSTETRICS & GYNECOLOGY 1161 (1978).

Even though most parents seem to be supportive of their pregnant daughters after some period of time,[42] parental consultation puts some minors at substantial risk. In about one-third of cases in which adolescents do not inform their parents about their pregnancy and planned abortion, they fail to do so because they fear physical punishment or some other form of severe reaction.[43] This fear should not be minimized. Based on parental reports in a national sample, 1.4 to 1.9 million children are kicked, bitten, punched, severely beaten, or actually victimized with a gun or knife by their parents.[44] Furthermore, parental sexual abuse is disturbingly common,[45] and, in a number of cases, the adolescent is seeking to abort a pregnancy resulting from parental incest. In addition to physical danger, substantial family disharmony can result from state mandated parental consultation, without any compensating assistance to the minor. There is no reason to doubt that, in general, those adolescents who choose not to consult with their parents have the least to gain and most to lose from consultation.

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[42] F. FURSTENBERG, UNPLANNED PARENTHOOD: THE SOCIAL CONSEQUENCES OF TEENAGER CHILDBEARING 54-57 (1976) (although over 67% of parents initially disturbed, eventually 70% become significantly less negative).

[43] *See Clary, supra* note 36, at 284 ("We have no way of knowing how valid these fears are. They reflect only the perceptions of these young women"). Even if adolescents misjudge their parents' response, the perception may be more important than the reality. Fear of parental reaction under enforced consultation may cause adolescents to delay seeking medical assistance or making a decision whether to abort, thereby putting themselves at greater medical and psychological risk. *See* Point IV(C), *infra.*

[44] Gelles & Straus, *Violence in the American Family*, 35(2) J. SOC. ISSUES 15, 24 (1979). Because these data are based on parents' self-report in interviews, these estimates are likely to be less than the actual frequency of physical maltreatment of children.

[45] *See generally* D. FINKELHOR & ASSOC., A SOURCEBOOK ON CHILD ABUSE (1986).

In sum, mandatory notice laws, ostensibly intended to increase parent-child communication, fail to achieve their intended effect.[46] There is no reason to believe that the State's Act—or indeed any attempt to enforce parental consultation—actually will lead to positive parental involvement or more rational decisionmaking by minors. Indeed, the National Academy of Sciences, in a major study, recently observed that almost all minors who employ judicial bypass procedures and avoid parental involvement are held to be mature, and their decision to have an abortion to be in their best interests.[47]

C. An "Arbitrary and Inflexible" 24-Hour Waiting Period Places Greater Burdens on Adolescents Than It Does on Adults.

The 24-hour waiting period here at issue imposes even greater burdens on adolescents' right to obtain an abortion than similar provisions this Court has struck down as applied to all women. In *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983), this Court concluded that the government "failed to demonstrate that any legitimate state interest is furthered by an ar-

[46] This was demonstrated in *Hodgson v. Minnesota*, No. 3-81 CIV 538, slip op. (D. Minn. Nov. 6, 1986). *Hodgson* is the only case in which there has been a full exposition on the merits of facts directly relevant to the issues at bar. The court stated that "defendants offered the court no persuasive testimony upon which a finding that Minnesota's parental notification law [with a 48-hour waiting period] enhances parent-child communications, or improves family relations generally." *Id.* at 26. Indeed, the court concluded that enforced parental consultation undermined family integrity and protection of minors. *Id.* at 42-47.

[47] *See* NAS REPORT, *supra* note 17, at 194-195:

> As a matter of practice, most [judicial] proceedings have turned out to be pro forma endorsements of minors' decisions. Most minors are found to be mature, and abortions are almost always found to be in the best interests of immature minors.

For supporting research see Melton & Pliner, *Adolescent Abortion: A Psycholegal Analysis in* ADOLESCENT ABORTION, *supra* note 16, at 26; Mnookin, *supra* note 36 at 239-240; *Judging Teenagers*; *supra* note 38; *see also Hodgson v. Minnesota*, at Appendix.

bitrary and inflexible [24-hour] waiting period," and held that such a waiting period was unconstitutional. *Id.* at 450. The primary concerns noted by the Court were that the waiting period increased the cost of obtaining an abortion by requiring the woman to make two separate trips to the abortion facility and increased the risk of obtaining an abortion because scheduling difficulties effectively delayed the planned abortion for longer than 24 hours. *Id.*

Almost without exception, courts that have considered the issue have recognized the substantial and undue burdens imposed by a 24-hour waiting period:

> The mandatory wait may combine with other scheduling factors such as doctor availability . . . to increase the actual waiting period to a week or more. [I]t is uncontested that delays of a week or more . . . increase the risk of abortion to a statistically significant degree [and] may push a woman into the second trimester, thus requiring that the operation be performed in a hospital, and significantly increasing the procedure's cost, inconvenience, and, of course, risk.

Women's Medical Ctr. of Providence, Inc. v. Roberts, 530 F. Supp. 1136, 1146 (D. R.I. 1982).[48] "Any delay increases the risk to the woman's health: the risk of major complications increases 20 to 30 percent each week of delay, and the risk of death increases about 50 percent each week." *Women's Comm. Health Ctr., Inc. v. Cohen*, 477 F. Supp. 542, 551 (D. Maine 1979).[49]

[48] *Accord Wynn v. Carey*, 582 F.2d 1375, 1389 (7th Cir. 1978) (delay "might force the minor into either a second trimester abortion which is more dangerous and expensive [because under Illinois law they must be performed in a hospital] or into not having an abortion at all if the second trimester has expired").

[49] The *Hodgson* court, ruling on a fully developed record, agreed: "Delay of any length in performing an abortion increases the statistical risk of mortality and morbidity. The increase in risk becomes statistically significant when the length of delay reaches one week." *Hodgson*, slip op. at 17.

These burdens on the right to obtain an abortion are particularly onerous for adolescents.[50] Adolescents already obtain abortions later in pregnancy than older women, and the risk of death at 16 weeks of gestation is 13 times greater than that at eight weeks or less. *See* Russo, *Adolescent Abortion: The Epidemiological Context in* ADOLESCENT ABORTION, *supra* note 16, at 57-67; NAS REPORT, *supra* note 17, at 114 and 277. Thus, the additional state-imposed delay needlessly compounds the health risks adolescents already experience.

In sum, Appellants' mandatory notice and waiting period provisions have no more than facial rationality and fail to withstand scientific scrutiny. These provisions increase the health risks of pregnant minors without any demonstrable enhancement of the parental role or the quality of decisionmaking.

V. THE PARENTAL NOTICE AND WAITING PERIOD PROVISIONS ARE UNCONSTITUTIONAL.

The legislative "findings" upon which the Act depends are based upon assumptions about children and their "proper" role in society, not upon empirical research. The State asks this Court to resolve complex constitutional issues on the basis only of folklore, sentiment, and its concept of how it would like the world to function.

But the State's findings are empirically testable assumptions about the psychological functioning of adolescents. When tested in the laboratory or in real-life situations, those assumptions have been shown to be wrong. As the National Academy of Sciences recently reported, "on the basis of existing research . . . *the contention that adolescents are unlikely or unable to make well-reasoned decisions or that they are especially vulnerable to serious*

[50] *See Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1142 (7th Cir. 1983) ("the same objections to the waiting period for adults listed in City of Akron apply to waiting periods for minors); *Hodgson*, slip op. at 17 ("[t]his statutorily imposed delay frequently is compounded by scheduling factors such as clinic hours, transportation requirements, weather, a minor's school and work commitments").

psychological harm as a result of an abortion is not supported." NAS REPORT, *supra* note 17, at 277 (emphasis added).[51]

The Court has held that "when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden . . . requires more than a bare assertion, based on a . . . complete absence of supporting evidence." *Carey v. Population Services Int'l*, 431 U.S. 678, 696 (1977); *see also Bender v. Williamsport*, 475 U.S. ——, 106 S. Ct. 1326, 1337 (1986) (Burger, C.J., dissenting) (eschewing "utterly unproven, subjective impressions"). The Act is therefore unconstitutional.

For minors younger than age 15, the Act might be said to serve some interests asserted by the State although for them the same ethical and professional mandates that guide health care professionals in determining whether any of their patients are competent to give informed consent should be sufficient protection. For adolescents aged 15-17, the large majority of minors seeking abortions, however, the Act is plainly unjustifiable. It unnecessarily intrudes on the privacy of most adolescents seeking abortions and imposes an undue burden on their right to choose whether to obtain an abortion. It wastes judicial resources in cases where adolescents, seeking to avoid parental involvement, petition the courts for determinations of maturity which almost invariably result in recognition of the minor's maturity and the appropriateness of her decision.[52]

[51] "Perhaps the most authoritative form of post-publication review of scientific findings occurs when organizations such as the National Academy of Sciences . . . appoint panels of the most distinguished scientists in the field, provide them with ample time and resources, and commission a state-of-the-art evaluation of a given area of research." Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 501 (1986).

[52] *See supra* note 47.

Amicus urges this Court to hold that States may not employ parental and waiting period requirements to interfere with the ability of minors to choose for themselves how and whether to involve their parents in their constitutionally protected decision. As is the case with adults, in circumstances in which the attending professionals have doubts as to the competence of the minor's consent, third-party determination of the issue would be appropriate. Such a structure would fully protect the competent minor's constitutional right to an unburdened abortion decision, would serve the State's interest in protecting immature minors from improvident decisions, and would serve the additional salutary purpose of freeing judicial resources from unnecessary inquiries.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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February 12, 1987

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 85-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,
Appellants,

v.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS

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IN THE

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OCTOBER TERM, 1986

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NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

v.

DAVID ZBARAZ, M.D. and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR LIFE LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS

Americans United for Life is a national public interest law firm which specializes in litigation relating to abortion, euthanasia and infanticide and which is dedicated to fostering respect for all stages of human life. Americans United for Life has filed briefs in approximately fifteen

abortion cases before the United States Supreme Court and also engages in litigation in both the federal and state courts.

SUMMARY OF THE ARGUMENT

There is a final judgment regarding both of the questions that were presented for review. Regardless of whether the Illinois Supreme Court ever decides that additional rules are desirable and promulgates such rules, it is clear that Illinois, by virtue of the Court of Appeals' decision, cannot require that teenage girls wait 24 hours after their parents have been notified to obtain an abortion. Thus, there is a final appealable judgment with respect to the 24-hour waiting period.

This Court has recognized that the finality rule has traditionally been given a practical rather than a technical construction. Although the injunction that was issued by the Court of Appeals regarding the judicial bypass procedures may appear temporary in nature, that injunction may, as a practical matter, be permanent since there is no indication that the anticipated further review of this case by the district court will ever come to pass.

Dismissal of this appeal would effectively put the State "out of court"—never able to enforce its statute, while never being able to have the Court of Appeals' decision reviewed by this Court. Since the purpose of § 1254(2) is "to ensure that a state statute is struck down by the federal judiciary only when it is found invalid by this Court, or when the parties acquiesce in the decision of a lower federal court," dismissal of this appeal would contravene Congress' intent in enacting that provision. *Maine v. Taylor*, 106 S.Ct. 2440, 2446 (1986).

A decision by this Court favorable to Appellants on both questions presented would finally terminate this litigation making further review unnecessary. Given this fact, and the uncertainty of when, if ever, the state

Supreme Court might issue the rules required by the Court of Appeals, this appeal represents the most appropriate and efficient course of action.

In enjoining the Illinois law, the Court of Appeals first determined that the same legal standards apply to both notice and consent provisions—that both require a judicial alternative. The court then determined that the judicial alternative contained in the Illinois law did not satisfy the requirements set forth in this Court's prior decisions. The court erred in both determinations and should be reversed.

First, a majority of this Court has never held that a parental *notice* statute must contain a judicial alternative to notice in order to be constitutional. The rationale for requiring a judicial alternative when a state passes legislation requiring parental consent, thereby giving parents a veto power over the abortion decision, is absent when the state requires only parental notification and does not grant parents any veto power. Therefore, no judicial alternative to parental notification is constitutionally mandated. Since no judicial alternative to notice is constitutionally mandated, the bypass provisions of the Illinois law represent an additional, but purely gratuitous, accommodation of the interests of Illinois minors that may be included or omitted by the State at will.

Second, assuming *arguendo*, that the same legal standards apply to notice and consent laws, the Illinois law should not have been enjoined since, on its face, it complies with this Court's prior decisions in the area of parental consent.

ARGUMENT

This appeal was taken from a decision by the Court of Appeals: 1) holding the 24-hour waiting period, required by the Illinois Parental Notice law, unconstitutional, and 2) enjoining enforcement of the statute "until the Illinois Supreme Court enacts rules assuring the expeditious and confidential disposition of the judicial hearings," and "remand[ing] the case to the district court for a determination of the constitutionality of the waiver of notice proceedings when such rules are enacted." *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985). Two questions were presented for review in Appellants' jurisdictional statement: 1) whether the court erred in striking the 24-hour waiting period, and 2) whether the court erred in enjoining enforcement of the statute pending promulgation of additional rules by the Illinois Supreme Court.

Initially, this Court postponed jurisdiction and limited review to the constitutionality of the 24-hour waiting period. 107 S.Ct. 267 (1986). On April 7, 1987, however, the Court ordered the parties to file supplemental briefs addressing two additional questions. The parties were to brief the merits of the second question concerning the sufficiency of the judicial bypass procedures contained in the law. They were also to address the question of whether the Court of Appeals' decision was sufficiently final to permit the Court to take jurisdiction over the case under 28 U.S.C. § 1254(2) to review both questions. 107 S.Ct. 1636 (1987). This supplemental *amicus* brief addresses only those questions set forth in this Court's order of April 7th. Treatment of the first question presented for review in Appellants' jurisdictional statement is contained in the Brief *Amicus Curiae* of Americans United for Life Legal Defense Fund, filed December 19, 1986 [hereinafter, AUL brief]. To the extent that those questions overlap, cross-reference is made to our earlier brief.

I. JURISDICTION UNDER SECTION 1254(2) IS PROPER SINCE THE COURT OF APPEALS RENDERED A FINAL JUDGMENT REGARDING BOTH QUESTIONS PRESENTED FOR REVIEW.

There is a final judgment regarding both of the questions that were presented for review. Regardless of whether the Illinois Supreme Court ever decides that additional rules are desirable and promulgates such rules, it is clear that Illinois, by virtue of the Court of Appeals' decision, cannot require that teenage girls wait 24 hours after their parents have been notified to obtain an abortion. Thus, there is a final appealable judgment with respect to the 24-hour waiting period.

There is also a final appealable judgment with respect to the second question presented for review. This Court has recognized that the finality rule has traditionally been given a "practical rather than a technical construction." *Firestone Tire & Rubber v. Risjord*, 449 U.S. 368 (1981), *quoting*, *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-414 (1926). Although the injunction that was issued by the Court of Appeals may appear temporary in nature, that injunction may, as a practical matter, be permanent. There is no indication that the anticipated further review of this case by the district court will ever come to pass. The Illinois Supreme Court has not promulgated any rules governing the judicial bypass provisions since the Court of Appeals rendered its decision almost two years ago. Thus, the statute may forever be enjoined pending promulgation of rules that will never be forthcoming.

A decision by this Court holding that the issuance of further rules by the Illinois Supreme Court is unnecessary and that the law is facially valid would eliminate the need for further review by the district court and finally resolve this litigation. Thus, this Court has jurisdiction to review whether the issuance of an injunction, which in effect may be permanent, was correct in the

first instance, and, if it was not, to reverse the decision of the Court of Appeals and direct that the injunction be dissolved.

Furthermore, neither the policies underlying § 1254(2) nor those underlying the final judgment rule would be served by dismissal of this appeal. As Justice Blackmun recently noted in *Maine v. Taylor*:

> Section 1254(2) serves to ensure that a state statute is struck down by the federal judiciary *only* when it is found invalid by this Court, or when the parties acquiesce in the decision of a lower federal court. Federal nullification of a state statute is a grave matter whether it occurs in civil litigation or in the course of a criminal prosecution, and review by this Court is particularly warranted in either event.

106 S.Ct. 2440, 2446 (1986) (emphasis added) (footnote omitted).

The State clearly has not acquiesced in the Court of Appeals' decision. Rather, it has claimed that the Seventh Circuit erroneously invalidated its law—that the law, on its face, is constitutional and should presently be operating. If the Illinois Supreme Court never issues additional rules, the Court of Appeals' injunction will remain in force permanently. Dismissal of this appeal would effectively put the State "out of court," never able to enforce its statute, while never being able to have the Court of Appeals' decision reviewed by this Court. *Taylor* holds that such a result would contravene the congressional intent behind § 1254(2). Accordingly, this Court has jurisdiction to review both issues under § 1254(2) and should do so.[1]

[1] Section 1254(2) does not specifically require that appeals be taken only from final judgments. However, in interpreting that section, this Court recently held that appeals pursuant to it must be from final judgments. *Thornburgh v. A.C.O.G.*, 106 S.Ct. 2169 (1986). While *Thornburgh* held that appeals must be from final judgments, it did not hold that a rigid meaning must be given to the phrase "final judgment." If a technical reading of the final judgment rule renders a result contrary to the intent of Congress in enacting § 1254(2), then a more flexible and practical determination of what constitutes a "final judgment" must be allowed in order to effectuate Congress' intent.

In addition to undermining the intent of § 1254(2), dismissal of this appeal also would fail to further any of the interests sought to be protected by the final judgment rule. In *Flanagan v. United States*, this Court identified those interests stating:

> The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice.

465 U.S. 259, 263-64 (1984).

This appeal does not in any manner vitiate these stated interests. This is not a case wherein a district court has never had a chance to render a final judgment and is being deprived of its opportunity to do so. Rather, the District Court had rendered a final judgment and permanently enjoined enforcement of the Act and has only reluctantly become the recipient of this case on remand.[2] Nor does the appeal in any way harass Appellees or clog the courts. Indeed, it would ill-serve the administration

[2] Unlike the situtation in *Thornburgh* where the Pennsylvania Supreme Court had issued rules which could be reviewed by the district court on remand, the Illinois Supreme Court has issued no such rules and has given no indication that it will ever do so. Thus, while this Court, in *Thornburgh*, concluded that those rules "should be considered by the District Court in the first instance," no such deference to the district court is warranted here. 106 S.Ct. at 2177 n.9.

of justice to have this case indefinitely carried on the District Court's docket.

A decision by this Court favorable to Appellants on both questions presented would finally terminate this litigation making further review unnecessary. Given this fact, and the uncertainty of when, if ever, the state Supreme Court might issue the rules required by the Court of Appeals, this appeal represents the most appropriate and efficient course of action. Accordingly, the Court has proper jurisdiction under § 1254(2) to review both questions set forth in Appellants' jurisdictional statement.[3]

II. THE COURT OF APPEALS ERRED IN ENJOINING ENFORCEMENT OF THE PARENTAL NOTICE LAW UNTIL THE ILLINOIS SUPREME COURT PROMULGATES ADDITIONAL RULES REGARDING THE JUDICIAL BYPASS PROCEDURES.

In enjoining the Illinois law, the Court of Appeals first determined that the same legal standards apply to

[3] Moreover, even if jurisdiction under § 1254(2) were deemed improper, the Court has jurisdiction to review both questions under 28 U.S.C. § 1254(1). *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 927 n.1 (1986). *See also* AUL brief at 9-11. Indeed, since "[f]ederal nullification of a state statute is a grave matter [making] review by this Court [] particularly warranted," *Taylor*, 106 S.Ct. at 2446 and n.4, this Court should certainly render a decision on the merits of this appeal.

Both questions meet the criteria governing review on certiorari. *See* AUL brief at 10 regarding the 24-hour waiting period. The Courts of Appeals are also split regarding the necessity of promulgation of explicit rules governing appeals. *See e.g., T.L.J. v. Webster*, 792 F.2d 734 (8th Cir. 1986) (no such explicit rules necessary); *Hodgson v. Minnesota*, 648 F. Supp. 756 (D.Minn. 1985) (Minnesota law which does not have explicit rules is constitutional as applied by Minnesota courts); *A.C.O.G. v. Thornburgh*, 737 F.2d 283 (3d Cir. 1984) (Pennsylvania Supreme Court must issue explicit rules governing appeals; *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985) (Illinois Supreme Court must issue explicit rules governing appeals).

both notice and consent—both require a judicial alternative. The court then determined that the judicial alternative contained in the Illinois law did not meet the requirements set forth in *Bellotti v. Baird*, 443 U.S. 622 (1979) (Bellotti II), *Akron v. Akron Center for Reprod. Health*, 462 U.S. 416 (1983) and *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983). The court erred in both determinations.

First, a majority of this Court has never held that a parental *notice* statute must contain a judicial alternative to notice in order to be constitutional and the same standard should not apply to notice and consent provisions. Second, even if the same standards were held to apply, the Illinois law contains a judicial alternative which, on its face, complies with this Court's decisions.[4]

A. A Judicial Alternative to Parental Notice Is Not Constitutionally Mandated and the Court of Appeals Erred in Holding that It Is.

In reviewing the Court of Appeals' decision regarding the procedures contained in the law, this Court must first determine whether a judicial alternative is constitutionally mandated in the context of a law requiring parental notice rather than consent. If no judicial alternative to notice is constitutionally mandated, the bypass provisions of the Illinois law represent an additional, but purely gratuitous, accommodation of the interests of Illinois minors that may be included or omitted by the State at will. Enforcement of the statute simply cannot be enjoined if no judicial bypass procedures are necessary in the first place.[5]

[4] Even if there were legitimate questions regarding the manner in which the Illinois courts would apply the law if given the chance, the Court of Appeals erred in failing to certify those questions to the Illinois Supreme Court pursuant to Illinois Supreme Court Rule 20, as Appellant had requested.

[5] Supreme Court Rule 15.1 states that "[t]he statement of a question presented will be deemed to comprise every subsidiary

A majority of this Court has never held that a state statute requiring parental notification prior to the performance of an abortion upon an unemancipated minor must also provide for a judicial alternative to parental notification. The statutes at issue in *Bellotti II*, *Akron* and *Ashcroft* all involved parental consent, where a veto power was given to parents, rather than parental notice which provides for no such veto power. *See* AUL brief at 23-25. *H.L. v. Matheson* was the only case in which the constitutionality of a statute requiring parental notice rather than consent was before the Court. And, in that case, the Court expressly declined to rule on the question of whether a judicial alternative is necessary in the context of parental notice. *See* AUL brief at 24-25.

Moreover, the rationale for requiring a judicial alternative when a state passes legislation requiring parental consent, thereby giving parents a veto power, is absent when the state requires only parental notification and does not grant parents any veto power. Under a notice statute the minor is never precluded from ulti-

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question fairly included therein." The second question presented by Appellant was: "Whether the judicial alternative to parental notification of the Illinois Parental Notice of Abortion Act of 1983 provides a constitutionally sufficient framework for ensuring confidential and expedited appeals." Fairly included within that question is the prerequisite question of whether any judicial alternative to parental notification is, in fact, constitutionally required. Thus, the question of whether a judicial alternative is constitutionally mandated in the context of parental notice is properly before this Court although it was not explicitly raised in the questions presented for review. *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980). *See also* AUL brief at 12-13.

Indeed, the Court of Appeals clearly recognized that it must find that a judicial alternative was necessary before attempting to address the validity of the specific bypass procedures contained in the Illinois law. Noting that states must provide a judicial alternative in the context of parental consent statutes, the court held that "[t]his standard also governs provisions requiring parental notification." 763 F.2d at 1539.

mately obtaining an abortion. Regardless of her parents' wishes, she may obtain an abortion once her parents have been notified. *See* AUL brief at 25.

Parents have a fundamental constitutional right to direct the upbringing of their children. *Bellotti II*, 443 U.S. at 637-639. It is virtually impossible for them to exercise this right and fulfill their responsibilities regarding the upbringing of their children when those children may obtain abortions without their knowledge.[8]

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[8] The record in *Hodgson* shows that some Minnesota judges simply "rubber stamp" petitions seeking waiver of notice. 648 F.Supp. at 766. Contrary to plaintiffs' assertions in that case, however, this fact does not indicate that parental notice laws serve no purpose. While it may show that the fundamental rights of some parents are not adequately protected, the practice of "rubber-stamping" does not detract from the benefits to other parents who are notified because of the statute's operation.

Nor does it in any way lessen the beneficial impact that the mere existence of parental notice laws appear to have on overall reduction in the teen *pregnancy* rate. For example, "[i]n Minnesota between 1980, the last full year without the notification law, and 1982, the first full year during which the law was in effect, the number of abortions obtained by minors decreased by 33 percent, from 2,327 to 1,565." Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Family Planning Perspectives 259, 266 (1983). During that same time period, the number of births to teens also decreased 13 percent from 7,033 in 1980 to 6,125 in 1982. (Statistics obtained from Minnesota Department of Health.) Since the total number of female teens decreased only about 4.5 percent during this time, it appears that the overall teen *pregnancy* rate in Minnesota has decreased significantly in response to that state's parental notice law.

Indeed, that teens are avoiding pregnancy altogether is also supported by the statements made by a pregnant teen seeking an abortion in Utah. In response to a question from the judge regarding whether she had attempted to prevent pregnancy the pregnant girl indicated that she had not since she thought she could easily obtain an abortion without her parents learning about it. *H.B. v. Wilkinson*, 639 F.Supp. 952, 956 (D.Utah 1986). Presumably, this girl would have used preventive measures or avoided sexual activity had she known that her parents would be notified in the event she became pregnant and sought an abortion.

A statute requiring notice to all parents protects their fundamental right to know of their daughter's abortion and to offer their advice and guidance to her during a most stressful time when she is faced with a decision of irreversible and serious consequences. Moreover, such a statute does not unduly burden the right of minors to obtain an abortion, since they may obtain an abortion after their parents have been notified. Thus, a proper balance between the rights of parents and their minor daughters is maintained by a parental notice law which has no judicial alternative. *H.L. v. Matheson*, 450 U.S. 398, 420-421 (1981) (Stevens, J., concurring).

B. Assuming *Arguendo* That A Judicial Alternative to Parental Notice Is Mandated, The Illinois Law Contains a Judicial Bypass Procedure That Is Constitutional on Its Face.

In *Ashcroft*, this Court stated:

> [T]he relevant legal standards with respect to parental-*consent* requirements are not in dispute. A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that 'the State must provide an alternative procedure whereby a pregnant minor may demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interest.'

462 U.S. at 490-491 (citations omitted) (emphasis added).

Assuming *arguendo* that these same standards apply to parental-notice requirements, "the issue here is one purely of statutory construction: whether [Illinois] provides a judicial alternative that is consistent with these established legal standards." *Id.* at 491-492.

The Illinois law contains a judicial alternative to its notice requirement which complies with the legal standards set forth in *Bellotti II*, *Akron* and *Ashcroft* regarding parental consent. It clearly requires the court to waive the notice requirement if it finds: 1) that the minor is mature, or 2) that notice to her parents would not be in her best interest. In addition, it states unequivocally that court procedures "*shall* be confidential" and "*shall* be given such precedence over other pending matters as is necessary to ensure that the court may reach a decision promptly." Ill. Rev. Stat. ch. 38 par. 81-65(c) (1985) (emphasis added). It also provides that "[a]n expedited confidential appeal *shall* be available . . . to any minor or incompetent to whom the court denies a waiver of notice." *Id.* at par. 81-65(f) (emphasis added). This statutory language is mandatory, not discretionary. Thus, although the statute does not spell out the precise manner in which Illinois courts are required to ensure confidentiality and expedited proceedings, it explicitly directs those courts to comply with these requirements. Therefore, the Court of Appeals erred in enjoining its enforcement.

None of this Court's prior decisions hold that a state notice or consent statute, in addition to requiring confidential and expedited proceedings, must also spell out in detail the manner in which those proceedings are to be kept confidential and to be expedited. *Akron* is not to the contrary. While the Court did hold the City of Akron's parental consent requirement unconstitutional, it did so because that "ordinance [did] not create expressly the alternative procedure required by *Bellotti II*." *Akron*, 462 U.S. at 440.

The Akron ordinance stated only that an abortion could not be performed on a minor under age 15 without:

> (1) First having obtained the informed written consent of one of her parents . . . , or

> (2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

462 U.S. at 422. Unlike the statute at issue here, the Akron ordinance did not set forth the requirements of *Bellotti II* concerning: 1) the proper standard to be applied, or 2) the necessity for confidential and expedited proceedings. Indeed, as the Court noted, it did not even appear that any courts in Ohio would have had jurisdiction to hear cases pursuant to Akron's city ordinance. *Id.* at 441.

Moreover, in striking the Akron ordinance, the Court relied heavily on the fact that it was only a city ordinance and not a state statute. As this Court stated:

> "It is reasonable to assume, as we did in *Bellotti I* [] and *Matheson* [], that a *state* court presented with a *state* statute specifically governing abortion consent procedures for pregnant minors will attempt to construe the statute consistently with consitutional requirements. This suit, however, concerns a municipal ordinance that creates no procedures for making the necessary determinations.

Akron, 462 U.S. at 441 (emphasis added).

According to *Akron*, then, it should be presumed that state courts which are presented with state statutes such as this, which specifically govern abortion notification procedures and expressly set forth the legal standards required by *Bellotti II*, will apply them in a constitutional manner. *See also Ashcroft*, 462 U.S. at 491 n.16 ("There is no reason to believe that Missouri will not expedite any appeal consistent with the mandate of our prior opinions.") In fact, state courts which have been allowed to apply the bypass procedures of statutes requiring notice or consent have done so in a constitutional manner. For example, although the Minnesota parental notice law does not contain specific rules describing the manner in

which its state courts shall provide confidential and expedited proceedings, those courts do provide such proceedings. Minn. Stat. Ann. § 144.343(6) (1987); *Hodgson v. Minnesota*, 648 F.Supp. at 762-763.

In response to a challenge to the Minnesota law as applied by the Minnesota state courts, the district court found that "[w]ith the exception of a hearing occurring shortly after enactment of [the notice law], judges in Minnesota have faithfully applied the standards set forth in [that law]." *Id.* at 762. The district court also found that "[t]hose involved in the proceedings take steps to insure confidentiality" and "have departed from normal routines when adhering to the routine would have threatened confidentiality." *Id.* at 763. Finally, the court found that "[n]o minor has been unable to obtain an expeditious appeal of an order denying her bypass petition." *Id.* In light of these findings concerning the five-year operation of the Minnesota parental notice law, the district court concluded that the statutory bypass provision complied with the dictates of this court.

There is every reason to believe that the Illinois courts, like those in Minnesota, will protect the confidentiality of minors petitioning under this law and provide them with expedited proceedings even though rules governing the express manner in which those proceedings are to be kept confidential and to be expedited are not contained in the statute. Although no explicit rules allowing juveniles to use their initials rather than their full names appear in the juvenile code, the Illinois courts routinely allow minors to file papers using only their initials in order to protect their confidentiality. *See e.g., In the Interest of J.B.*, 138 Ill. App. 3d 958, 487 N.E. 2d 52 (1985); *In the Interest of M.A.*, 132 Ill. App. 3d 444, 477 N.E. 2d 27 (1985). Certainly the circuit courts will do the same under the parental notice law since that law expressly requires confidentiality. It can also be expected that any

appeals taken pursuant to the law will be expedited pursuant to existing Supreme Court rules which allow expedited appeals since the law also expressly requires that they be expedited. *See* Ill. Sup. Ct. Rules 303 and 311.

Therefore, the Illinois law presently provides a framework for bypass procedures which meets constitutional requirements. The Court of Appeals erroneously enjoined its enforcement, and its decision must be reversed.

CONCLUSION

For the foregoing reasons, this Court should review both questions presented in the Appellants' jurisdictional statement and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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CLERK

No. 85-673

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

v.

DAVID ZBARAZ, M.D., and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIFF OF THE STATE OF NEVADA, AMICUS CURIAE, IN SUPPORT OF APPELLANTS

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No. 85-673

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

NEIL F. HARTIGAN, in his official capacity as Attorney General of the State of Illinois; his agents and successors, and RICHARD M. DALEY, in his official capacity as State's Attorney for Cook County, Illinois; his agents and successors; and all others similarly situated,

Appellants,

v.

DAVID ZBARAZ, M.D., and ALLAN G. CHARLES, M.D., individually and on behalf of a class of all others similarly situated,

Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATE OF NEVADA, AMICUS CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

Nevada joins its sister state Illinois in urging this Court to review the decision of

the United States Court of Appeals for the Seventh Circuit in the case sub judice. Further, Nevada joins Illinois in its assertion that the Illinois Parental Notice of Abortion Act, Ill. Rev. Stat. ch. 38, ¶¶ 81-61 to -70 (1985), provides a constitutionally sufficient framework for ensuring confidential and expedited appeals of judicial decisions denying waiver of parental notification.

Nevada's parental notification provisions, Nev. Rev. Stat. §§ 442.255, .2555 (1985), are, like the Illinois statute, a legislative attempt to accommodate a child's constitutional right to privacy, Planned Parenthood v. Danforth, 428 U.S. 52, 74-75 (1976) (Danforth), and the interest of the state in encouraging parental involvement in one of the most serious decisions a young child may make. H.L. v. Matheson, 450 U.S. 398 (1981); Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti II).

Although Nevada's notification process itself is different from Illinois', both states' statutes designate the judiciary as the independent decision-maker to determine whether parental notification is in the minor's best interest. (Nevada's statute is dissimilar in that it provides first for an informal interview between the judge and the minor; if the minor's request for waiver of parental notification is denied by the judge after the interview, the minor is given the opportunity to file a petition, in a process very similar to Illinois'. Nev. Rev. Stat. §§ 442.255, .2555 (1985).) Nevada's provision for appellate review of judicial decisions requiring parental notification is also similar to Illinois'.[1]

The federal judiciary enjoined enforcement of both the Illinois and Nevada statute prior

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1. The full text of Nevada's provisions is set forth in the Appendix at 1.

to the statutes' operative dates. Relying on the Seventh Circuit's decision in this case, the United States District Court for Nevada enjoined the appellate provisions of the Nevada statute until the Nevada Supreme Court promulgated the appellate rules mandated by the statute. Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985).[2] The Nevada Supreme Court has been reluctant to promulgate such rules since other portions of the statute have also been enjoined. Since Nevada finds itself in the same impasse as Illinois, it has an interest in seeing this issue resolved.

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2. The United States Court of Appeals for the Ninth Circuit has vacated submission of Nevada's appeal from the district court's preliminary injunction pending this Court's decision in this case. Glick v. McKay, 616 F. Supp. 322, (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985) (order vacating submission March 13, 1987).

SUMMARY OF ARGUMENT

This Court should review the court of appeals' decision. The states need further elucidation of the constitutional status of the minor's right to privacy vis-a-vis the state's interest in encouraging, through a mere parental notice requirement, parental involvement in a minor's decision to have an abortion. The interests of the state in encouraging parental involvement have been recognized, but those interests have never been squarely juxtaposed against the interest of a minor in avoiding parental notification. The states and the judiciary need further guidance from this Court.

This need, although compelling, is not the sole reason for Nevada's interest in this case. Both Illinois' and Nevada's statutes were enjoined until the Illinois and Nevada supreme courts promulgate rules to govern appeals from denials of waivers. Nevada's

Supreme Court has been hesitant to promulgate rules since the statute is the subject of litigation. Illinois' Supreme Court may have been similarly motivated. Nevada and Illinois have therefore been hampered in their attempts to accommodate several interests.

It appears that another reason for rejection of the Illinois and Nevada statutes is that they were not identical to those statutes that had previously received this Court's imprimatur. The lower courts have failed to pay deference to the unique status of each state. They would have all statutes be a mirror image of the Missouri statute that this Court approved in Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1982). Further federal judicial entanglement in the states' attempts to reconcile different interests will be obviated by a resolution of this appeal.

Even if parental notification statutes are subject to the same constitutional scrutiny as parental consent statutes, Illinois' statute (as well as Nevada's) provides a framework for a confidential and expeditious resolution of the process. This Court has not required that states fine-tune their statutes; the Constitution does not require perfection. The Illinois statute provides adequate assurance that the minor's request for waiver of parental notification will be considered confidentially and expeditiously.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE SEVENTH CIRCUIT'S DECISION IN ORDER TO PROVIDE FURTHER CLARIFICATION OF THE CONSTITUTIONAL LIMITS UPON A STATE'S INTEREST IN ENCOURAGING PARENTAL INVOLVEMENT IN A MINOR'S DECISION TO HAVE AN ABORTION.

There are three reasons that justify reviewing the Seventh Circuit's decision. First, the states and the judiciary would benefit from further guidance as to the parameters of a state's right to encourage

parental involvement in a minor's decision to have an abortion. Second, Illinois is not alone in the dilemma caused by judicial decisions enjoining state statutes prior to the statutes becoming effective. Third, the states have been discouraged from experimenting with legislation to accommodate competing interests by the judicial reluctance to sanction a statute that is not identical to statutes previously approved of by this Court.

A. THE STATES AND THE JUDICIARY WOULD BENEFIT FROM FURTHER ELUCIDATION OF THE PARAMETERS OF A STATE'S ABILITY TO CONSTITUTIONALLY ENCOURAGE PARENTAL INVOLVEMENT IN A MINOR'S DECISION TO HAVE AN ABORTION.

The states have been hampered in their attempts to constitutionally accommodate their interest in ensuring that a minor's decision to terminate her pregnancy is well-informed and reasoned. Although this Court has frequently reviewed legislative attempts to ensure that a minor makes a knowledgeable decision about an abortion, see Planned

Parenthood v. Danforth, 428 U.S 52 (1976); Bellotti v. Baird, 443 U.S. 622, 639 (1979) (plurality opinion) (Bellotti II); H.L. v. Matheson, 450 U.S. 398 (1981); City of Akron v. Akron Center for Reproductive Health, 462 U.S 416 (1982); Planned Parenthood Ass'n v. Ashcroft, 462 U.S 476 (1982), the approach taken by the Court has been far from single-minded. Bellotti II and Ashcroft were pluralities, while Danforth was a five to four decision.

The states need further elucidation of the constitutional status of the minor's right to privacy vis-a-vis the state's interest in encouraging, through a mere notice requirement, parental involvement in a minor's decision to have an abortion. This case presents the opportunity for resolution of the questions that remain unanswered by previous pronouncements of this Court. See generally, Scott, Legal and Ethical Issues in Counseling

Pregnant Adolescents, in Adolescent Abortion, 118-19 (G. Melton ed. 1986) (discussing the uncertainties of Supreme Court decisions).

The issue should be resolved finally. Nevada's interest in this issue is compelling. In 1984, five hundred and seventy-three children ranging in age from ten to seventeen had abortions in Nevada. Registrar of Vital Statistics, Nevada Human Resources Department, Nevada Vital Statistics Report 1983-1984 38-47 (1986). While the figure may seem small in comparison to other states, this figure represents approximately ten percent of all abortions performed in that year. Id. These children and their physicians were not required to notify the child's parents prior to the abortion.

In 1985, Nevada, like twenty-five other states, enacted a statute that encourages parental involvement in a minor's decision to have an abortion. Nevada joined Illinois and

seven other states in requiring only parental notification, not consent.[3] By choosing to require only parental notification rather than consent, Nevada recognized the minor's interest in making the abortion decision herself. Planned Parenthood v. Danforth, 428 U.S 52, 74-75 (1976). But Nevada, like Illinois, sought to protect several other interests.

Nevada sought to encourage parental involvement in a minor's decision to have an abortion. The interest of the states in encouraging parental involvement in the important decision whether to terminate a pregnancy is based upon constitutionally permissible grounds. H.L. v. Matheson, 450

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3. A complete list of the states and citations to the relevant statutes are set forth in Appellant Hartigan's Jurisdictional Statement at 9. Citations to the brief filed by Appellants appear as "App. Br. ___;" citations to the Appellee's brief appear as "App'ee Br. ___."

U.S. 398, 409 (1981); Bellotti v Baird, 443 U.S. 622, 634 (1979) (plurality opinion) (Bellotti II).

Obviously, a minor should exercise a fully informed judgment in deciding whether or not to have a child. The decision to have a child is "'a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support.'" H.L. v. Matheson, 450 U.S. at 410 (citing Bellotti II, 443 U.S. at 640-41). Nevada recognized that parents are better suited to offer such advice and counsel to their daughters than are emotionally uninvolved third parties. Even physicians at abortion clinics, where abortions for pregnant minors frequently take place, are not equipped to adequately counsel and support the minor child. H.L v. Matheson,

450 U.S. at 410;[4] cf. Planned Parenthood Ass'n v. Ashcroft, 462 U.S 476, 488 n.12 (1982) ("[N]ot all abortion clinics, particularly inadequately regulated clinics, conform to ethical or generally accepted medical standards.").

Nevada also recognized the important role and interest that parents have in the care and raising of their children. See H.L. v. Matheson, 450 U.S. at 410. Our society grants parents the constitutional right, within reason, to direct the rearing of their children. Bellotti II, 443 U.S. at 639 n.18 (plurality opinion). Encouraging parental involvement in the abortion decision recognizes the parents' interest in the

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4. In fact, Appellees themselves admit that common sense dictates a conclusion that "'parental consultation is usually desireable and in the best interests of the minor.'" App'ee Br. at 41 n.34.

development of their children into well-adjusted, mature adults.

Protection of the minor and the physician from uninformed medical decisions is also a constitutionally cognizable interest that was recognized by Nevada in enacting this legislation. Parents are best able to supply essential medical and other information to a physician contemplating treatment of a child. H.L. v. Matheson, 450 U.S. at 411. Minors simply may not be able to recall or relate important histological information that would affect an abortion procedure or any other surgical operation.[5]

While these state interests have been recognized by this Court, they have never been

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5. In Nevada, a physician must receive consent from the parents of a minor whenever the minor seeks medical treatment, unless the minor is married, living apart from the parents, is a mother, or has borne a child, or there is a medical emergency. Nev. Rev. Stat. § 129.030 (1985).

squarely juxtaposed against the interest of the minor in avoiding mere parental notification. City of Akron v. Akron Center for Reproductive Health, 462 U.S 416, 469 n.12 (1982) (O'Connor, J., dissenting). A majority of this Court has never held that a minor's right to privacy is affected by a notice provision in the same manner as a consent provision. The subject continues to be open to debate. See, e.g., Note, Constitutional Law: The Minor's Right to Consent to Abortion: How Far is Oklahoma from Akron?, 37 Okla. L. Rev. 780, 799, 805 (1984) ("Until the Supreme Court is directly confronted with the issue of notice to parents of mature minors, the applicability of Matheson to that class of minors will remain uncertain.").

So far, the determinative factor in this Court's decisions regarding minors' abortion rights has been the unreasonable burden placed upon a minor's right to privacy if a

third-party has veto authority over that decision. For instance, in Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (Danforth), this Court opined that "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for an abortion of an unmarried minor." Id. at 74. In Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion) (Bellotti II) this Court expounded upon Danforth by ruling that "if the state decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion may be obtained." Id. at 643 (footnote omitted).

Language in Bellotti II that "every minor must have the opportunity--if she so desires--to go directly to a court without first consulting or notifying her parents," id. at 647, has been viewed by some as

requiring that a minor must also be given an opportunity to avoid parental notification even if parental consent is not required. However, the Massachussetts statute in Bellotti II was not a mere parental notification statute like Nevada's and Illinois'. The Massachussetts statute also required parental or judicial consent for the abortion.

Because the parents or the judiciary could absolutely prohibit the abortion, it was requiring too much to compel the minor to notify her parents if she were going to seek judicial consent for the procedure. If the minor were required to notify her parents, she might have to overcome two obstacles: her parents, who might obstruct access to the court, and the court itself, which would be the ultimate arbiter of her decision to have an abortion. Under those circumstances, the

state could not impose an additional condition or burden upon initial access to the court.

Neither Danforth nor Bellotti II "determine[d] the constitutionality of a statute which does no more than require notice to the parents without affording them or any other third party an absolute veto." Bellotti II, 443 U.S. at 654 n.1.

Similarly, City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1982) (Akron), and Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1982), did not determine the effect of a mere parental notification statute. In Akron, a majority of the Court reiterated that blanket parental consent provisions are not constitutional. Akron, 463 U.S. at 439. This Court found that the Akron ordinances did not create a constitutionally adequate alternative to parental consent. On the other hand,

Missouri's statute was facially constitutional. Ashcroft, 462 U.S. at 476.

Some courts have opined that the Akron decision requires the courts to apply the same constitutional analysis to both consent and parental notification provisions. Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127 (7th Cir. 1983); see also Glick v. McKay, 616 F. Supp. 322, 324-25 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985); Akron Center for Reproductive Health, Inc. v. Rosen, 633 F. Supp. 1123, 1131-32 (N.D. Ohio 1986), appeals docketed sub nom. Akron Center for Reproductive Health, Inc. v. Slaby, No. 86-3664 (6th Cir. July 18, 1986) (appeal of State of Ohio), No. 86-3717 (6th Cir. Aug. 4, 1986) (appeal of defendant Slaby). In reaching that conclusion, the courts have taken generalized statements and transformed them into authoritative holdings.

This Court stated in Akron that a state's interest in encouraging parental involvement "must give way to the constitutional right of a mature minor or of an immature minor whose best interests are contrary to parental involvement." Akron, 462 U.S. at 427-28 n.10. Further, this Court noted that a procedure whereby parents would be notified when a minor filed a petition seeking court consent for an abortion would be unconstitutional as applied to a mature minor. Id. at 441 n.31. The Pearson court believed that these footnotes were "necessary to [the Court's] holding." Pearson, 716 F.2d at 1132 n.2. With all due respect to the Seventh Circuit, neither of those statements were necessary for the resolution of the issues which were presented.

First, the statement that a procedure would be unconstitutional if the parents of a minor were notified when she filed a petition seeking court approval of the abortion is

merely a reaffirmation of the Court's decision in Bellotti II: If a state requires parental or judicial consent to an abortion, thereby creating the possibility of a third-party veto of the decision, the state can not impose an additional condition to judicial access by requiring the minor to inform her parents of her intent to seek judicial consent.

Similarly, the footnoted statement that a minor had to be able to avoid "parental involvement" was not necessary to the Akron decision, nor can it be taken out of the context and the posture of the case. Because this Court was addressing only the issue of a parental consent statute, its casual use of the phrase "parental involvement" cannot be interpreted beyond the confines of the facts and issues being considered. Indeed, although this Court recognized that such a notification provision of the Akron ordinance was upheld by the Court of Appeals, Akron Center for

Reproductive Health, Inc. v. City of Akron, 651 F.2d 1198, 1206 (8th Cir. 1981), aff'd in part, rev'd in part, 462 U.S. 416 (1983), it did not comment on the validity of that ruling. See Scott, Legal and Ethical Issues in Counseling Pregnant Adolescents, in Adolescent Abortion, 119 n.5 (G. Melton ed. 1986).[6]

The only time that this Court has had occasion to address a notification statute was in H.L. v. Matheson, 450 U.S. 398 (1981). In

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6. Justice Stevens joined the majority in Akron in finding that the alternatives to parental consent were constitutionally insufficient. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1982). However, Justice Stevens dissented from the majority opinion in Danforth that held blanket consent provisions unconstitutional. 428 U.S. 52, 101. Similarly, he concurred specifically in H.L. v. Matheson, 450 U.S 398, 420 (1981), and opined that the Court should address the issues posed by parental notification statutes and find that such statutes are constitutional even as applied to mature minors. His agreement with the majority in Akron cannot be presumed to be an agreement with Justice Powell's statements regarding parental involvement.

that case, a Utah statute requiring mere parental notification was held to be constitutional as applied to an unemancipated minor who was living with and dependent upon her parents and who made no claim or showing of her majority or her relationship with her parents. A majority of the Court specifically declined to "decide in what circumstances a state must provide alternatives to parental notification." Id. at 413 n.22. That decision has still not been made.

Because the issue has not been resolved by this Court, the judiciary, as well as the states, treads lightly when trying to extrapolate constrictions upon notification provisions from previous Supreme Court decisions regarding consent provisions.

For instance, the Seventh Circuit enjoined Illinois' judicial by-pass provisions until the Illinois Supreme Court enacted rules to govern hearings that allow an immature minor

"whose best interests require an abortion" to forego parental notification. Zbaraz v. Hartigan, 763 F.2d 1532, 1545 (7th Cir. 1985), juris. postponed, ___ U.S. ___, 107 S. Ct. 267 (1986). In so doing, the Seventh Circuit merely restated the standard for waiver of parental consent, and did not recognize that the standard in the Illinois' statute requires only that the minor show that parental notification is not in her best interest. Ill. Rev. Stat. ch. 38, ¶ 81-65 (1985).

Clearly, the standard relative to consent provisions is whether the abortion would be in the minor's best interest. Bellotti v. Baird, 443 U.S. 622, 647 (1979). However, the standard for parental notification should be different. Because it is the parental notice that the minor seeks to avoid, the judge must focus not on whether the abortion itself is in the minor's best interest, but whether avoidance of parental notification is in the

minor's best interest. Cf. H.L. v. Matheson, 450 U.S. 398, 414 (1981) (Powell, J., concurring) (reserved question of whether the statute was constitutional as applied to a minor "whose best interest would not be served by parental notification").

In arriving at that decision, it is irrelevant whether the judge agrees with the minor that the abortion decision is correct. Otherwise, a judge who does not believe an abortion is in the best interest of the minor may exercise a veto over the abortion. That is not the authority given to the judiciary by the Illinois statute. In Illinois (and Nevada), a judge must issue the order waiving parental notification if notifying the parents is not in the child's best interest. Thus, a judge may think that an abortion is not the best alternative for the minor, but if the minor can show, for instance, that her parents may abuse her, he has a nondiscretionary duty

to allow the minor to make the abortion decision herself.

While several courts have recognized this proposition, most notably the Seventh Circuit Court of Appeals, Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127, 1134 (7th Cir. 1983); see also, Glick v. McKay, 616 F. Supp. 322, 323 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985); Akron Center for Reproductive Health, Inc. v. Rosen, 633 F. Supp. 1123 (N.D. Ohio 1986), appeals docketed sub nom. Akron Center for Reproductive Health, Inc. v. Slaby, No. 86-3664 (6th Cir. July 18, 1986) (appeal of State of Ohio), No. 86-3717 (6th Cir. Aug. 4, 1986) (appeal of defendant Slaby), the fact that the Seventh Circuit would subsequently misconstrue the standard for waiver of parental notification points to the need for further review of this entire genre of legislation.

Nevada is not alone in its desire for further guidance from this Court. The uncertainty as to how this Court will view a parental notification statute may have motivated the United States Court of Appeals for the Ninth Circuit to delay its ruling on Nevada's appeal.[7] The Ninth Circuit heard oral argument on Nevada's appeal from the issuance of a preliminary injunction enjoining Nevada's parental notification statute on March 13, 1986. The Ninth Circuit has twice vacated submission of the case pending further clarification from this court. Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985), appeal

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7. Nevada's appeal from the issuance of the preliminary injunction requested that the Ninth Circuit decide the case on the merits rather than on the appropriateness of the injunction. The fact that the Ninth Circuit is waiting for this Court's pronouncements may well point toward a decision on the merits. Such a decision would be appropriate. Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, 106 S. Ct. 2169, 2176-77 (1986).

docketed, No. 85-2335 (9th Cir. Aug. 6, 1985) (order vacating submission Apr. 16, 1986) (awaiting this Court's decision in Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, 106 S. Ct. 2169 (1986); id. (order vacating submission March 13, 1987) (awaiting this Court's decision in this case). Until the consequences of parental notification are fully identified and analyzed, the states and federal judiciary remain bereft of guidance that is a necessary prerequisite to effective accommodation of potentially competing interests.

B. THE FEDERAL JUDICIARY'S WILLINGNESS TO ENJOIN THE STATES' STATUTORY SCHEMES HAS PLACED THE STATES UPON THE HORNS OF A DILEMMA.

The desire for further guidance, although significant, is not the sole reason for Nevada's interest in this case. Nevada also shares the fundamental comity concerns expressed by Illinois. See App. Br. 27-30.

In his brief, Appellant Hartigan asserted that the Illinois Supreme Court may have been hesitant to adopt rules governing appeals from the denial of the waiver of parental notification because of reluctance to interfere in federal litigation or "its hope that forthcoming federal court pronouncements will eliminate, or at least clarify, its obligations." App. Br. 15. The Nevada Supreme Court has openly expressed these same concerns.

In a letter to Nevada Attorney General Brian McKay, the Nevada Supreme Court noted its opposition to adopting rules during the pendency of the Nevada litigation because in its opinion, "if the United States District Court's decision is ultimately upheld, the work and expense of promulgating and printing rules would be totally lost . . . . [I]f the U.S. District Court decision is not totally upheld on appeal, any rule-making efforts

which follow may profit from a reading of the appellate opinion."[8]

The Seventh Circuit decision (upon which the United States District Court for Nevada relied) has placed the states in a "catch-22" situation. When it enjoined the statute until the Illinois Supreme Court promulgated rules, the Seventh Circuit presumed that the state supreme court would be willing to promulgate rules that might ultimately be mooted by resolution of the challenge to the entire statute. The presumption has proven incorrect. In the meantime, Illinois' and Nevada's legislative schemes have remained inoperative because of the federal judiciary's unwillingness to presume that the states' highest courts will proceed in a constitutional manner. Immediate review of the Seventh Circuit's decision may obviate any

8. The full text of the cited letter is found at Appendix 5.

further unwarranted federal judicial entanglement in the states' decisions to encourage parental involvement.

C. THE STATES ARE BURDENED BY THE FEDERAL JUDICIARY'S RELUCTANCE TO ALLOW THE STATES TO DEVISE STATUTES THAT BEST ACCOMMODATE COMPETING INTERESTS WITHIN THE CONTEXT OF EACH STATE'S CIRCUMSTANCES.

The unwarranted hesitation to assume the states' highest courts will act constitutionally is merely one indicator of the general distrust of the states' attempts to legislate in this arena. The abortion issue, perhaps more than any other in recent history, evokes emotion and disagreement even among jurists.[9] It cannot be denied that "many men and women of good will and high commitment to constitutional government place themselves on both sides of the abortion controversy."

9. "Part of the problem is that both sides in this dispute rely on prior cases such as Bellotti in which no majority opinion was enunciated." Note, Minors' Right of Privacy, 8 J. Juv. L. 170, 177 (1984)

Thornburgh v. American College of Obstetricians and Gynecologists, ___ U.S. ___, 106 S. Ct. 2169, 2196 (1986) (White, J., dissenting).

The highly emotional nature of the abortion controversy perhaps predisposes jurists (and others) to view the states' legislative attempts in an almost ritualistic manner, without considering the ramifications of decisions enjoining the legislation. The states which have attempted to legislate in a value neutral posture are affected by the judicial decisions as intimately as those which clearly legislate with an anti-abortion value preference. "[S]weeping rejections of legislative enactments often result from a tendency to generalize the holdings of cases and drive those generalizations to an extreme which, while perhaps exhibiting conceptual purity, belies the emptiness of logical constructs devoid of empirical content." American College of Obstetricians v.

Thornburgh, 737 F.2d 283, 317 (3rd Cir. 1984) (Adams, J., sur denial of petition for rehearing), aff'd, ___ U.S. ___, 106 S. Ct. 2169 (1986).

One apparent basis for judicial rejection of the Illinois and Nevada statutes was that they were not identical to those statutes that had previously received this Court's imprimatur. The Illinois by-pass statute was enjoined, in part, because it did not detail how a minor would be assured anonymity at the appeliate level. The Seventh Circuit Court of Appeals was apparently concerned that the Illinois statute, unlike the Missouri statute in Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1982), did not specifically allow the minor to use her initials. Certainly, designating a minor by her initials is one method of ensuring confidentiality. However, a state is not constitutionally required to

adopt a statute that is identical to another state's.

States have responded to the complex issue of a minor's ability to make an informed abortion decision in a myriad of fashions, each of which is designed in light of the state's geographical, demographic, and sociological status. Some states, such as Maryland, permit waiver of parental notification if a physician believes that the minor will be subjected to emotional or physical abuse. Md. Health-Gen. Code Ann. § 20-103(c) (1982). Others have required a minor to receive an adult's permission, either one of her parent's or a judge's, to have the abortion. Mo. Rev. Stat. § 188.028 (Supp. 1982). The variations are as diverse as the states. The judiciary must recognize that each state's circumstances are unique and must allow the states to legislate accordingly. As of yet, the judiciary does not seem to be

willing to allow any statute to be enforced unless it is identical to the Missouri statute found to be constitutional in Ashcroft.

For instance, Nevada's parental notification provision and its by-pass provisions are geared toward the state's primarily rural nature. The enjoined Nevada legislation provides two mechanisms by which an unemancipated or unmarried minor woman may seek a waiver of parental notification. A minor may first request that a state district court judge issue an order waiving parental notification. If the minor makes such a request, the judge must interview the woman at the earliest practicable time, which must not be more than two judicial days after the request is received. If the judge determines from any information provided by the adolescent that she is mature enough to make an intelligent and informed decision concerning the abortion, or that she is

financially independent and is emancipated, or that notice to her parents would be detrimental to her best interest, the judge has a nondiscretionary duty to issue an order authorizing the abortion without parental notification within one day after the interview. If the judge does not issue an order, the waiver is deemed to be granted.

This interview mechanism is geared to the geographical and demographic status of Nevada. The state encompasses 110,561 square miles, however, all but two of the seventeen counties have fewer than 50,000 inhabitants. There are very few services for juveniles. It is appropriate, in the context of this unique situation, that the Legislature authorized state district court judges to conduct an informal interview with the adolescent for the purpose of determining whether the facts and circumstances of that minor's pregnancy are

such that parental notification should be waived.

As far as Nevada conditions are concerned, the interview process is the most straightforward, clear, and simple procedure that can be imagined. A district court exists in every county. It is invariably located in a courthouse whose location is a matter of common public knowledge. State court judges have secretaries who receive mail, answer the telephone, and make appointments for the judges. Yet, the United States District Court for the District of Nevada cavalierly opined that "[i]t is difficult to believe that a district court could conduct its business in this manner." Glick v. McKay, 616 F. Supp. 322 (D. Nev. 1985), appeal docketed, No. 85-2335 (9th Cir. Aug. 6, 1985).

Nevada, as well as other states, has been frustrated by approaches such as this in its attempt to experiment with legislation that

affords significant weight to the interest of the state in ensuring that the pregnant minor makes an informed decision about an abortion.

The frustration of efforts is particularly egregious in Nevada. Nevada's Legislature meets biennially. Nev. Const. art. 4, § 2. When statutes are challenged and enjoined after the Legislature adjourns, but prior to their operative date (as in this case), Nevada must wait another two years to amend the statute. This has the effect of preventing the state from giving effect to a statute enacted by the representatives of the people. Nevada's parental notification provisions have been enjoined for two years, even though there has been no determination that the provisions are unconstitutional. Review of the Seventh Circuit decision is appropriate not only to protect Illinois from the "extraordinary burden that an erroneous injunction imposes," App. Br. 32, but also to ensure that other

states are not subjected to similar consequences.

II. THE ILLINOIS STATUTE PROVIDES THE FRAMEWORK FOR A CONFIDENTIAL AND EXPEDITIOUS RESOLUTION OF REQUESTS FOR WAIVER OF PARENTAL NOTIFICATION.

While this Court has set forth general guidelines to assist the states with their attempts to encourage parental involvement in a minor's abortion decision, the law is still evolving. Whenever a state attempts to regulate under these circumstances, it undertakes an extremely difficult task. On review, this Court should therefore pay appropriate deference to the Legislature's attempt to wrestle with the problems of abortion regulation. See Erzoznik v. City of Jacksonville, 422 U.S. 205 (1975). "The Constitution does not compel a state to fine-tune its statute," H.L. v. Matheson, 450 U.S. 398, 413 (1981), it does not "'demand unattainable feats of statutory clarity.'" Planned Parenthood v. Arizona, 718 F.2d 938,

948 (9th Cir. 1983) (citations omitted). "'Absolute precision in drafting laws in not demanded.'" Id. at 948 (citations omitted). Deference is particularly appropriate when considering a Legislature's attempt to provide a process to govern an appeal from a decision denying a minor waiver of parental notification. Each state better understands its own judicial system and the practical effect of local rules or customs on the manner in which appeals are handled and drafts its legislation accordingly.

While paying lip service to the ideal, the Seventh Circuit was not willing to defer to the presumed willingness of the Illinois Supreme Court to act in accordance with constitutional requirements. Zbaraz v. Hartigan, 763 F.2d 1532, 1544 (7th Cir. 1985), juris. postponed, ___ U.S. ___, 107 S. Ct. 267 (1986). Instead of enjoining the Illinois statute until the rules were

promulgated, the Seventh Circuit should have been mindful of this Court's willingness to presume that a state supreme court will review appeals in a constitutional manner. Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 491 n.16 (1983). The language of the Illinois statute is sufficiently definite and capable of being construed in a constitutional manner, irrespective of further rule-making, and should therefore be upheld on its face.

In construing provisions governing waiver of parental involvement in the abortion decision, this Court has counseled that a state must provide an alternative procedure that must "'assure' that the resolution of this issue 'will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.'" Ashcroft, 462 U.S. at 491 n.16 (citing Bellotti v. Baird, 443 U.S. 622, 644 (1979) (plurality opinion)). The alternative

need not be specific in the manner in which it is to operate. All that is necessary is a "framework for a constitutionally sufficient means of expediting judicial proceedings." Ashcroft, 462 U.S. at 491 n.16.

Illinois' and Nevada's statutes compare favorably with the Missouri statute found to have met this standard in Ashcroft. The Missouri statute states that "[b]ecause time may be of the essence regarding the performance of the abortion, the supreme court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section." Mo. Rev. Stat. § 188.028(2)(6) (Supp. 1982). Illinois' statute provides that an "expedited confidential appeal shall be available." Ill. Rev. Stat. ch. 38, ¶ 81-65. Nevada's provision states, "[t]he court, shall by court order or rule, provide for a confidential and expedited appellate review of cases appealed

under this section." Nev. Rev. Stat. § 442.2555(5) (1985).

While neither of these statutes is identical to Missouri's, they accomplish the same objective: They provide the "framework' for expeditious review of denial of a waiver of parental notification. Nothing more is constitutionally required. The Seventh Circuit was therefore incorrect in its determination that as written, the statute did not provide sufficient assurance of an expedited and confidential appeal. Zbaraz, 763 F.2d at 1543-47.[10]

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10. This Court has interchangeably used the terms "confidentiality" and "anonymity." Compare, Bellotti v. Baird, 443 U.S. 622, 644 (1979) (a resolution of the issue must be completed with anonymity), with Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 491 n.16 (1983) (confidentiality is assured by allowing the minor to use initials on her petition). See also Zbaraz v. Hartigan, 763 F.2d 1532, 1543 (7th Cir. 1985), juris. postponed, ___ U.S. ___, 107 S. Ct. 267 (1986).

The Illinois legislation is a mandate to the Illinois state courts to conduct the proceedings in accordance with constitutional requirements. This provision, reflecting an intent to prevent disclosures, would be interpreted by a state court to require confidentiality, even in the absence of rules defining the mechanism by which confidentiality will be achieved. It certainly cannot be assumed that state courts would permit the minor's identity to be revealed when the intent of the legislation is so plainly to safeguard against disclosure of her identity. There simply is no reason to believe that the state courts would act inconsistently with constitutional mandates. Ashcroft, 462 U.S. at 491 n.16.

Further, there is precedent for proceeding with a pseudonym even in the absence of a provision specifically allowing its use. For instance, Fed. R. Civ. P. 10(a) requires that

pleadings contain the name of the parties. Nonetheless, even in the absence of a particular exemption to the requirement, federal courts have allowed individuals to use pseudonyms when "there is a need for the cloak of anonymity." United States v. Doe, 655 F.2d 920, 922 n.1 (9th Cir. 1981). State courts will allow a minor to proceed in the same fashion.

Similarly, it cannot be assumed that state courts will not expedite review. Ashcroft, 462 U.S. at 491 n.16. Further, it is incorrect to posit that a state must specify the exact time frame within which the judiciary must make a decision on the minor's appeal from a denial of a request for waiver of parental notification. The Missouri statute in Ashcroft did not specify when the juvenile court was to enter an order either denying or granting waiver of parental consent. Yet this Court found that the

statute was facially constitutional. Ashcroft, 462 U.S. at 490. Thus, the Illinois statute's lack of specific time frames does not render the statute unconstitutional as written. Cf. Indiana Planned Parenthood Affiliates Ass'n v. Pearson, 716 F.2d 1127, 1136 (7th Cir. 1983) (If the Indiana statute had specified the procedure for appeals or at least directed the Indiana Supreme Court to promulgate rules governing expedited appeals, the court would have been satisfied with the constitutionality of the appellate provisions of the statute.).

CONCLUSION

Nevada, as well as other states, needs further guidance from this Court as to the constitutional parameters of a minor's right to make abortion decisions herself. Otherwise, disservice is done to the state's significant interests in ensuring that a minor's decision to have an abortion is one

that is based upon a full understanding and recognition of the permanent implications such a decision will have on the rest of the minor's life.

The judicial alternative provided by Illinois (and by Nevada) is constitutional. The legislation provides the framework by which the minor is given the opportunity for an expeditious and confidential resolution of her request for avoidance of parental notification. The Seventh Circuit's decision enjoining the legislation until the Illinois Supreme Court promulgates rules should therefore be reversed.

Respectfully submitted,

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APPENDIX

442.255 Notice of custodial parent or guardian; request for authorization for abortion; rules of civil procedure inapplicable.

1. Unless in the judgment of the attending physician an abortion is immediately necessary to preserve the patient's life or health or an abortion is authorized pursuant to subsection 2 or NRS 442.2555, a physician shall not knowingly perform or induce an abortion upon an unmarried and unemancipated woman who is under the age of 18 years unless a custodial parent or guardian of the woman is personally notified before the abortion. If the custodial parent or guardian cannot be so notified after a reasonable effort, the physician shall delay performing the abortion until he has notified the parent or guardian by certified mail at his last known address.

2. An unmarried or unemancipated woman who is under the age of 18 years may request a district court to issue an order authorizing an abortion. If so requested, the court shall interview the woman at the earliest practicable time, which must be not more than 2 judicial days after the request is made. If the court determines, from any information provided by the woman and any other evidence that the court may require that:

(a) She is mature enough to make an intelligent and informed decision concerning the abortion;

(b) She is financially independent or is emancipated; or

(c) The notice required by subsection 1 would be detrimental to her best interests,

the court shall issue an order within 1 judicial day after the interview authorizing a physician to perform the abortion in

accordance with the provisions of NRS 442.240 to 442.270, inclusive.

3. If the court does not find sufficient grounds to authorize a physician to perform the abortion, it shall enter an order to that effect within 1 judicial day after the interview. If the court does not enter an order either authorizing or denying the performance of the abortion within 1 judicial day after the interview, authorization shall be deemed to have been granted.

4. The court shall take the necessary steps to ensure that the interview and any other proceedings held pursuant to this subsection or NRS 442.2555 are confidential. The rules of civil procedure do not apply to any action taken pursuant to this subsection.

(Added to NRS by 1981, 1163; A 1985, 2309)

442.2555 Procedure if district court denies request for authorization for abortion: Petition; hearing on merits; appeal.

1. If the order is denied pursuant to NRS 442.255, the court shall, upon request by the minor if it appears that she is unable to employ counsel, appoint an attorney to represent her in the preparation of a petition, a hearing on the merits of the petition, and on an appeal, if necessary. The compensation and expenses of the attorney are a charge against the county as provided in the following schedule:

(a) For consultation, research and other time reasonably spent on the matter, except court appearances, $20 per hour.

(b) For court appearances, $30 per hour.

2. The petition must set forth the initials of the minor, the age of the minor, the estimated number of weeks elapsed from the probable time of conception, and whether maturity, emancipation, notification detrimental to the minor's best interests or a combination thereof are relied upon in avoidance of the notification required by NRS 442.255. The petition must be initialed by the minor.

3. A hearing on the merits of the petition, on the record, must be held as soon as possible and within 5 judicial days after the filing of the petition. At the hearing the court shall hear evidence relating to:

(a) The minor's emotional development, maturity, intellect and understanding;

(b) The minor's degree of financial independence and degree of emancipation from parental authority;

(c) The minor's best interests relative to parental involvement in the decision whether to undergo an abortion; and

(d) Any other evidence that the court may find useful in determining whether the minor is entitle to avoid parental notification.

4. In the decree, the court shall, for good cause:

(a) Grant the petition, and give judicial authorization to permit a physician to perform an abortion without the notification required in NRS 442.255; or

(b) Deny the petition, setting forth the grounds on which the petition is denied.

5. An appeal from an order issued under subsection 4 may be taken to the supreme court, which shall suspend the Nevada Rules of Appellate Procedure pursuant to N.R.A.P. 2 to provide for an expedited appeal. The notice of intent to appeal must be given within 1 judicial day after the issuance of the order. The record on appeal must be perfected within 5 judicial days after the filing of the notice of appeal and transmitted to the supreme court. The court, shall, by court order or rule, provide for a confidential and expedited appellate review of cases appealed under this section.

(Added to NRS by 1985, 2306)

SUPREME COURT OF NEVADA
E.M. GUNDERSON, CHIEF JUSTICE
CARSON CITY, NEVADA

February 19, 1987

The Honorable Brian McKay
Attorney General
Office of the Attorney General
Carson City, Nevada 89710

Dear Attorney General McKay:

As you know, the statute to which you refer in your letter of February 12 is subject to constitutional challenge in the federal courts, and its enforcement has been enjoined. In view of these facts, until the federal challenges are resolved, I do not expect this Court to promulgate implementing rules.

Several factors will probably motivate us to defer action, including the following. First, it seems unproductive to adopt rules which would make the public believe that certain state court remedies may be pursued, when in fact those remedies would not now be available. Second, if the United States District Court's decision is ultimately upheld, the work and expense of promulgating and printing rules would be totally lost. Third, if the U.S. District Court decision is not totally upheld on appeal, any rule-making efforts which follow may profit from a reading of the appellate opinion.

Warmest personal regards.

Very truly yours,
E.M. Gunderson

EMG/lr

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-673

In The

Supreme Court of the United States

October Term, 1986

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NEIL F. HARTIGAN, Attorney General
of the State of Illinois, et al.,

Appellants,

vs.

DAVID ZBARAZ, M.D. et al.,

Appellees.

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On Appeal From The United States
Court of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF AMICI CURIAE

Family Research Council
United Families Foundation
Family Life League
Pro-Life/Pro-Family Coalition
In Support of Appellants

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63 pp

No. 85-673

In The

Supreme Court of the United States

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INTEREST OF THE AMICI

All four amici are involved in educational, clinical or counseling programs that encourage parental participation in the significant life crises ir their children including their daughters who become pregnant. These programs are viewed with competitive disfavor by abortion clinics and counselors who, in the experience of the amici, undervalue the significance of parental counseling for pregnant teenage girls who are considering abortion. The counseling programs which amici support, encourage or operate will be severely weakened if the lower court decisions declaring the Illinois parental counseling statute unconstitutional are not overturned by this Court.

United Families Foundation (UFF) is an independent, nonprofit research and

educational foundation organized to educate the general public concerning the value of maintaining the family unit as the bedrock and strength of America, and to protect it from policies and practices that tend to fragment or weaken the family. UFF headquarters are in Washington, D.C.. UFF has more than 40,000 member-subscribers nationwide.

Family Research Council (FRC) is an independent, non-partisan, non-profit research and education organization with headquarters in Washington, D.C. active to ensure that the interests of families are respected in the formulation of public policy. FRC maintains a research network composed of more than 1,000 academics, professionals, and researchers who provide information concerning the impact of proposed or existing public policies upon family integrity.

Family Life League (FLL) is a non-profit Illinois corporation dedicated to promoting and defending the interests and integrity of families. FLL operates numerous educational programs for adults and children supporting the values of family integrity, parental responsibility, and parent-child communication. FLL members participate in crisis pregnancy counseling services in which volunteers provide professional skill, support, and non-abortion services to pregnant teenage girls.

The **Pro-life/Pro-family Coalition** (PLPFC) is an association based in South Chicago, Illinois, consisting of ministers, priests, and leading lay members of more than 100 churches. PLPFC opposes the exploitive activities of many family planning programs in the Chicago area that exacerbate the centrifugal

pressures upon families of minorities and poor. Many of the ministers composing PLPFC are engaged in counseling pregnant teenagers and their parents.

Members of all four amici include numerous parents of teenage daughters who have been, are, or may become pregnant with unexpected pregnancies, whose parents earnestly desire the opportunity for consultation to benefit their children.

This brief is submitted to aid the Court to understand that it has jurisdiction to hear this case on appeal, and that the Illinois Parental Notice of Abortion Act of 1983 is constitutionally sound in substance and procedure.

The written consent of the parties to the filing of this amicus brief has been filed with the Clerk of Court.

SUMMARY OF THE ARGUMENT

The Illinois Parental Notice of Abortion Act of 1983 provides a minimum opportunity for parental consultation, which is something distinct from and preserves a more specific interest than either of its constituent requirements of parental notification and a 24 hour waiting period. The Act contains six well-defined exceptions which exclude from the requirements all reasonably conceivable categories of persons whose interests would be significally impaired by providing the opportunity for parental consultation.

The provisions for confidential and expedited trial and appellate procedures do not violate the minors' constitutional rights because the Constitution does not mandate that a state provide any statutory judicial bypass procedure when mere

parental consultation, as distinguished from parental consent, is required.

Even if the Constitution required a statutory judicial bypass procedure, the Act would be valid because its bypass procedure is sufficient under the appropriate standard for reviewing abortion regulates applicable only to minors. Great deference is owed state laws attempting to balance the conflicting interests of parents and children, and the federal government created by the Constitution, including the judicial branch of it, is not empowered to regulate such domestic matters.

This case is appropriately before the Court for appellate review because a "final" determination has been issued. This fact remains notwithstanding the Court of Appeals directive that the district court maintain continuing

jurisdiction and conduct further proceedings should the State take further action.

ARGUMENT

I. The Illinois Act Carefully Protects The Interests of Parents and Minors

A. Illinois' Parental Notice of Abortion Act of 1983 Clarified: The Two Requirements, Six Exceptions, Exacting Procedural Protections.

In 1983 the Illinois legislature enacted the Parental Notice of Abortion Act of 1983 (hereinafter called "the Act"). Ill. Ann. Stat. ch. 38, §81-61 (Smith-Hurd Supp. 1986). The Act contains two clear requirements which, together, insure parents a minimum opportunity to consult with their daughter about abortion before an irreversible, major moral and medical decision is made. The Act contains six exceptions to insure against

possibly unnecessary delay or potential detriment to the minor. And it contains explicit, inclusive procedural protections providing prompt access to trial and appellate courts to consider judicial waiver.

The Act prohibits any person to "perform an abortion upon an unemancipated minor or upon an incompetent unless he or his agent has given at least 24 hours actual notice to both parents or to the legal guardian of the minor pregnant woman or incompetent [patient] . . . ." Id. at §81-64(a). "[A]ctual notice" means "the giving of notice directly, in person or by telephone . . . ." Id. at §81-63(c).

Violation of the Act is a Class A misdemeanor. It also constitutes prima facie evidence of failure to obtain informed consent and of interference with family relations in civil actions. Id. at §81-68.

The Act also contains six specific exceptions. The first is the anti-redundancy exception. If the doctor has been notified (orally or in writing) by another physician that the referring physician or his agent previously has given notice, the notice and consultation period requirements do not apply.

Second, the Act provides an unavailable-parent exception. If the parents are divorced or one of them is not available "in a reasonable manner or time," notice to the parent who is available or, if both parents or the legal guardian is unavailable, "notice to any adult person standing in loco parentis shall be sufficient." Id. at §81-64(b).

Third, the Act contains an explicit exception for medical emergencies. "[W]hen, in the best medical judgment of a physician based on the facts of the case

before him, a medical emergency exists that so complicates the pregnancy as to required an immediate abortion" the notice and consultation period requirements do not apply. Id. at §81-66.

Fourth, the Act contains an exception for previously-informed parents. If the parents or the guardian entitled to notice appears in person with the girl at the clinic, or if they "submit notarized statements indicating that they have been notified," the requirements do not apply. Id. at §81-67(a).

Fifth, the Act contains an incest exception. Notice to the father of the pregnant minor is unnecessary if the pregnant girl's mother (or other adult relative if the mother is unavailable) personally submits a notarized statement to the physician or agent that she reasonably believes that the girl is

pregnant by her own father. Id. at §81-67(b).

Finally, if the pregnant minor seeking the abortion objects to any notice being given to her parents or a parent, she, or her next friend, may petition, without any filing fee, for waiver of the notice requirement. Id. at §81-64(c)(h). The Act requires the circuit court to grant the petition if it finds either "(i) That the minor or incompetent is mature and well-informed enough to make the abortion decision on her own, or (ii) That notification . . . would not be in the best interests of the minor or incompetent." Id. at §81-65(d).

Procedurally, the Act allows the petition to be filed either in the county where the minor resides or where the abortion is to be performed. Id. at §81-64(c). It further provides not only that

the minor may personally participate on her own behalf in such proceedings, and that the court "shall appoint a guardian-ad litem for her," but also that she has the right (of which the court must advise her) to the assistance of a court-appointed personal attorney. Id. at §81-65(b). The petition for waiver is given precedence over all other matters, and the court must rule on the petition within 48 hours of the time of the application (unless the petitioner asks for an extension). Id. at §81-65(c). Not only are the proceedings themselves to be "confidential" and (as amended) "insure the anonymity of the minor or incompetent," but a confidential record must be maintained which contains written findings of fact and conclusions of law. Id. at §81-65(c)(e). An "expedited confidential appeal" is specifically

authorized, and the Illinois Supreme Court is explicitly requested to enact rules to ensure "an expeditious and confidential" appeal. Id. at §81-65(f)(g).

B. The Purposes of the Act.

The Act contains specific legislative findings that, inter alia "the medical, emotional and psychological consequences of abortion are serious and can be lasting especially when the patient is immature," id. at §81-62(b)(2), that "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences," id. at §81-62(b)(1), that "panel consultation is usually desirable and in the best interests of the minor," id. at §81-62(b), and that parents may be able to provide important medical information to the physician performing the abortion, as well as "ensure that [their daughter]

receives adequate medical attention after her abortion." Id. at §81-64(b)(4)(5).

The Act also identified three specific legislative purposes: "(1) protecting minors against their own immaturity, (2) fostering the family structure and preserving it as a viable social unit, and (3) protecting the rights of parents to rear children who are members of their household." Id. at §81-62(a). Thus, the drafters of the Act were convinced that parental consultation, per se, was generally in the best interests of minors. They were also of the opinion that parental consultation would strengthen the family in most cases--the parent-child bonds, which also would work for the betterment of the pregnant minor.

The pro-family purpose of the statute is underscored by the fact that the Act specifically provides that failure to

comply with its provisions constitutes prima facie evidence of "interference with family relations" in civil actions. Id. at §81-68. Moreover, the legislature further emphasized: "Nothing in this Act shall be construed to limit the common law rights of parents."

C. The Illinois Act Ensures An Opportunity For Parental Consultation.

The two crucial requirements of the Act, together, insure a minimum opportunity for parents to consult with their pregnant daughter, which opportunity neither of the requirements, standing alone would insure. The solitary requirement of parental notification is not sufficient to insure an opportunity for parental consultation. Parental notification can be delivered by telephone. Id. at § 81-63(c). It need

not be delivered in person; the minor need not deliver the notice (in fact, under the statute, the doctor or his agent is required to give notice to the parents). If notice by telephone were given to the parents just a few minutes, or even a few hours, before an abortion was performed on their daughter, the requirement for "parental notification" would be satisfied, but the parents would have been deprived of the benefit of parental notification--the opportunity to counsel with their daughter.

Likewise, the mere requirement of a 24 hour waiting period, but itself, would not insure parental consultation. A waiting period would give the minor an opportunity, if she chose, to voluntarily counsel with her parents or others. But half of the minors obtaining abortion today refuse to voluntarily notify their

parents (See our prior brief at ___). Thus, if the parents were not notified, the waiting period would not give them an opportunity to exercise their right to counsel with their daughter regarding a major crisis and potentially serious decision.

The requirement of parental notification coupled with a 24 hour waiting period provides a minimum opportunity for parents to consult with their daughter regarding abortion. It gives the parents a minimum opportunity to find and speak with their daughter, to investigate the situation, to seek advice from their family doctor, or others to whom they may turn in times of family crisis. It gives them a chance to prepare themselves, and to prepare their daughter, for a morally profound, and socially and medically significant decision.

Thus, wholly apart and distinct from the separate benefits of parental notification and of a 24 hour waiting period, the Illinois Act insures a minimum opportunity for parental consultation. That is consistent with the explicitly stated purpose and intent of the Act.

II. The United States Constitution Does Not Require A Statutory Judicial Bypass Alternative To Parental Consultation Provisions.

A. The Supreme Court Has Only Held That the Constitution Requires a Bypass Alternative When Parental Consent is Required.

This Court has decided five cases in which the merits of states statutes regulating parental involvement in the abortion decision of a minor daughter have been considered. In four of these cases, the state statutory scheme under

consideration by the Court required parental consent, not mere notification or consultation. Because the requirement of parental consent erected an absolute veto over the decision of the minor, the Court invalidated the schemes in three of the cases. In the fourth case, it upheld the parental notice requirement because it contained a judicial bypass provision. In the fifth case, the Supreme Court upheld a Utah statute requiring parental notification in all cases, if possible, despite the fact that the statutory scheme contained <u>no</u> judicial bypass provision. In none of these cases did the Court hold that a statutory judicial bypass procedure is required when the state strikes the balance between parents and minors by requiring mere consultation, nor has the Court held that the minor has a right to obtain a secret abortion.

In Planned Parenthood v. Danforth, 428 U.S. 52 (1976) the Court invalidated a Missouri statute which required parental consent to abortion. The basis for the decision was expressed unequivocally: "[T]he State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of her pregnancy. [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto. . . . Id. at 74. The Court opined that the requirement of parental consent was overbroad so far as effectuating the state interest in enhancing parental authority because it was unlikely that "such veto power will enhance parental authority or control. . . . Id. at 75.

In Bellotti v. Baird, 443 U.S. 662 (1979), eight members of the Court agreed that a Massachusetts statute requiring a pregnant minor to obtain parental consent or, failing that, judicial consent to abortion was unconstitutional. Four members of the Court, in a plurality opinion written by Justice Powell, emphasized two points. First, "if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it must provide an alternative procedure whereby authorization for the abortion can be obtained." Id. at 643. Second, "every minor must have the opportunity--if she so desires--to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her

own, the court must authorize her to act without parental consultation or consent. [Likewise] she must be permitted to show that an abortion nevertheless would be in her best interests." Id. at 647. Four other justices, in an opinion written by Justice Stevens, agreed that the Massachusetts scheme was unconstitutional because under it a third party, either the parents or the judge, held "an absolute veto over the minors' decision" to have an abortion. Id. at 654. However, these justices specifically repudiated the "advisory opinion" suggesting that parental notification constitutionally could not be required in all cases. Id. at 656 n. 4. Likewise, Justice White dissenting, thought "inconceivable a holding that the United States Constitution forbids even notice to parents when their minor child who seeks

surgery objects to such notice and is able to convince a judge that the parents should be denied participation in the decision." Id. at 657. Thus, in Bellotti, a clear majority of the justices declined to endorse the suggestion that the Constitution requires a judicial bypass alternative to parental notification.

In H.L. v. Matheson, 450 U.S. 398 (1981) the Court upheld a Utah statute which required the physician intending to perform an abortion on a minor to "notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed. . . ." Id. at 401. Unlike the Illinois Act, the Utah provision contained no exceptions except the "if possible" provision. The Court observed that "[t]here is no logical relationship between the capacity to become pregnant

and the capacity for mature judgment considering the wisdom of an abortion." Id. at 406. Reiterating a point made by in Bellotti, the Court emphasized that:

> A State reasonably may determine that parental consultation often is desirable and in the best interest of the minor. It may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision--one that for some people raises profound moral and religious concerns...
>
> "There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bare a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place."

450 U.S. at 410. The Court further emphasized "that parents have an important 'guiding role' to play in the upbringing

of their children,... which presumptively includes counseling them on important decisions." The Court noted that the Utah statute gave "neither parents nor judges a veto power over a minors' abortion decision." Id. at 411. And the Court agreed that the statute significantly furthered the substantial state interests of fostering family integrity and protecting adolescents from their own immaturity and unwise judgment. "That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." Id. at 413.

Five members of the Court emphasized that immature minors have "no

constitutional right to notify a court in lieu of notifying their parents" id. at 413 n. 22, and that the decision "leaves open the question" whether parental notification might violate the constitutional rights of a mature minor. Id.; id at 414 (Powell, J., concurring). The sixth member of the majority, Justice Stevens, wrote a separate opinion stating: "I would reach the question reserved by the Court and hold that the Utah parental notice statute is constitutionally valid as applied to all members of the certified class. He emphasized the profound significance of the abortion decision for the minor and her family, the strong state interest "appropriate consultation [for the minor] should include parental advice." Id. at 423, and "that the State's interest in protecting a young pregnant woman from the consequences of an

incorrect abortion decision is sufficient to justify the parental-notice requirement. . . ." Id. at 425.

In City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983) the Court invalidated a city ordinance which, inter alia, required written consent of a parent before an abortion could be performed upon a minor age 14 or younger. Id. at 440. Interestingly, the Akron ordinance also contained a parental consultation provision very similar to the Illinois law, but with much fewer exceptions. It required "at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion. . . ." Akron Cautified Ordinances §1870.05, as cited id. at ___ n.1. The Court of Appeals for the Sixth

Circuit upheld that requirement. 651 F.2d at 1206. The Supreme Court did not review that decision. 462 U.S. at 439 n. 29.

Finally, in Planned Parenthood Ass't v. Ashcroft, 462 U.S. 476 (1983) the Court upheld a Missouri statute that required either parental consent or judicial consent (based upon the mature minor or best interests standards discussed in the prior cases). The Court concluded that the trial court had interpreted the Missouri statute too grudgingly, and that, as reasonably interpreted, it was constitutional. Id. at __.

Thus, it is clear that this Court has equated parental notification with parental consultation. H.L., 450 U.S. at 410-11. The Court has upheld unequivocally the requirement of parental notification as to most minors, and has never held that parental notification is

unconstitutional for minors who are mature or emancipated. (The Court equated maturity with emancipation in H.L. 450 U.S. at 406 ("either mature or emancipated," "demonstrably mature minors").

B. The Profound Difference Between Parental Consent and Parental Consultation Eliminates The Need For A Constitutionally-Mandated Statutory Judicial Bypass Procedure When Mere Parental Consultation Is Required.

From the beginning, the Court has emphasized the awesome and absolute "veto" which parental consent constitutes. Danforth, 428 U.S. at 74; Bellotti, 443 U.S. at 640, 643, 644; H.L., 450 U.S. at 411. And the Court has repeatedly emphasized the value and importance of parental participation in the abortion

decision. "[The State] may further determine, as a general proposition, that such consultation is particularly desirable with respect to the abortion decision--one that for some people raises profound moral and religious concerns." Bellotti, 443 U.S. at 640 (Powell, J., plurality); H.L., 450 U.S. at 409-410.

Because of the unique nature of parental consent, judicial bypass as a substitute for parental consent is not uncommon in American law. For instance, many states allow judicial consent to the marriage of a minor as a substitute for parental consent when the parents are unavailable. Wardle, Rethinking Marital Age Restrictions, 22 J. Fam. L. 1, 9 n. 42; Ill. Ann. Stat. ch. 40 §208(a) (Smith-Hurd 1980). Additionally, at least seven states, including Illinois, allow state judges "to override the refusal of parents

to consent to the marriage of the minors." Wardle, supra at 10; Ill. Ann. Stat. ch. 40 §208(a) (Smith-Hurd 1980). Since a pregnant minor may consider marriage as an alternative to abortion, the propriety of judicial consent as a substitute for parental consent is particularly relevant.

Likewise, judicial authority to override parental refusal to consent to necessary medical surgery for a minor child is well established. See, e.g., In re Sampson, 37 App. Div. 2d 668, 323 N.E. 2d 253 (1971), Aff'd 29 N.Y. 2d at 900, 278 N.E. 2d at 18, 326 N.Y. 2d 398 (1972); In re Custody of a Minor, 393 N.E. 2d 836 (Mass. 1979); In re Guardianship of Phillip B, 139 Cal. App. 3d 407, 188 Cal. Rptr. 781 (1983); Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944). Illinois statutes specifically authorize as much. Ill. Ann. Stat. ch. 37-702-4 (Smith-Hurd

supp. 1987); see also id at ch. 23, §2055 (Smith-Hurd supp. 1987). Inasmuch as abortion is a surgical procedure, a widespread use of judicial substitute for parental consent is likewise relevant.

But all of these schemes involve parental notice. Indeed, it is beyond question that it would violate the due process clause of the fourteenth amendment of the Constitution if a state were to empower a judge to enter an order overriding parental refusal to consent to medical treatment or marriage without notice to the parents. For if judges are to act as judges, they must afford those persons whose legal interests are directly affected due process of law. To authorize judges to act otherwise would be to empower them to perform nonjudicial functions, and that would violate one of the oldest and most respected principles

of constitutional law--separation of judicial power from other governmental powers. Hayburn's case, 2 U.S. (2 Dall.) 409 (1792) (impropriety of Act of Congress delegating nonjudicial functions to federal judges); compare I.N.S. v. Chadha, 462 U.S. 919 (1983).

Statutes in many states recognizes the right of doctors to render emergency medical treatment to minors without parental consent. See, e.g., Ill. Ann. Stat. ch. 111-4503 (Smith-Hurd supp. 1987). Likewise, where serious public health risks are involved, as in the case of venereal diseases and drug addiction, some states have authorized minors to consent to their own treatment. Id. at §4504. Even then, Illinois law, as many other state laws, requires the attending physician to encourage the involvement of the parents, and authorizes the physician

to notify the parents even over the objection of the minor in some circumstances. Id. at §§4504, 05. The specificity and narrowness of such exceptions to the general rule of parental consent emphasize not only the scope and potency of that general rule, but even while making exceptions to it they underscore the importance of parental consultation. There is simply no analogy to or precedent for the proposition that a minor has a right to conceal a significant moral/medical decision from her parents, much less that the Constitution mandates that minors be permitted to deny their parents the opportunity to counsel with them regarding a decision of such profound moral and medical magnitude.

III. **Even If The Constitution Required A Statutory Judicial Bypass Alternative To Parental Consultation, The Illinois Act Is**

Sustainable.

A. Strict Scrutiny Is Not The Appropriate Standard For Reviewing A Parental Consultation Statute Like The Illinois Act.

In passing upon abortion restrictions applicable to the general population, the Court has applied the "compelling state interests" standard of scrutiny. Roe v. Wade, 410 U.S. 113, 155 (1973). However, when assessing the constitutionality of abortion regulations aimed at minors, the Court has applied a different standard. In Danforth the majority noted: "The Court indeed, however, long has recognized that the State has somewhat broader authority to regulate the activities of children than of adults." 428 U.S. at 74. The Court went on "to examine whether there is any significant state interest" served by the

statute. Id. at 75. And the Court referred to a "sufficient justification" rather than a "necessity" standard of nexus. In Carey v. Population Services, Int'l, 431 U.S. 692 (1977) the plurality in an opinion written by Justice Brennan, emphasized that when "fundamental" constitutional rights of minors are infringed by a state statute, the appropriate "test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults." Id. at 693 n. 15. "State restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult.'" Id. at 692. See also, Akron, 462 U.S. at 427 n. 10; H.L., 450 U.S. at 411; Bellotti, 443 U.S. at 643-44.

The Seventh Circuit, below, held the Illinois Act to the much more restrictive and demanding scrutiny standard. Zbaraz v. Hartigan, 763 F.2d 1532, 1537 (7th Cir. 1985). If the lower court had applied the appropriate standard, it would have given more latitude to the state and would have upheld the Illinois Act.

B. Federal Courts Owe Great Deference To State Legislative Enactments Regulating Parent-Child Relations.

In the cases above discussed, this Court has emphasized that federal judges owe substantial deference to state legislative decisions regulating domestic relations, particularly parent-child relations. This is because state laws regulating parent-child relations do not simply involve state-versus-individual conflicts. Rather, in this area of the law the state acts to balance individual-

versus-individual rights, specifically the rights of parents in tension with the rights of maturing unemancipated children. "It is important to distinguish the individual interests and domestic relations from the social interest in the family and marriage a social institution." Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177 (1916).

Parents--as parents--have "fundamental" constitutional rights, too. This Court has emphasized, for more than 60 years, that "without doubt" among the "liberties" protected by the 14th amendment are the rights "to marry, to establish a home and bring up children. . . ." Myer v. Nebraska, 262 U.S. 390, 393 (1923). "The child is not the mere creature of this State; those who nurture and direct his destiny have the right,

coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court recognized that parents have a right to direct the moral education of their children, and protect them from detrimental influences "at the crucial and formative adolescent period of life. . . ." Id. at 211. Seven years later, the Court reiterated the importance of parental prerogatives to participate in and influence critical medical decisions respecting the welfare of their children.

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children . . . [H]istorically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.
>
> . . . That some parents "may at times be acting against the interests of their child" . . . creates a basis for caution, but is hardly a reason to

> discard wholesale those pages of human experience that parents generally do act in the childs' best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.

Parham v. J.R., 442 U.S. 584, 602 (1979).

See further, Moore v. City of East Cleveland, 431 U.S. 494 (1974); Prince v. Massachusetts, 321 U.S. 158 (1944).

> [C]onstitutional interpretation has consistently recognized that parents' claims to authority in their households to direct their rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others . . . who have this primary responsibility for childrens' well-being are entitled to the support of laws design to aid discharge of that responsibility.

Ginsberg v. New York, 390 U.S. 629, 639 (1968).

Thus, when the state attempts to balance the emerging rights of adolescent unemancipated minors with the continuingly

critical rights of parents to raise their own children, federal courts are bound to give great respect to those decisions. In Ginsberg the Court held: "We do not demand of legislatures 'scientifically certain criteria of legislation.' Noble State Bank v. Haskell, 219 U.S. 104, 110." 350 U.S. at 642-43. In H.L., the court upheld Utah's parental notification statute (despite the fact that it contained only one exception) because: "The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions." 450 U.S. at 413. Likewise, in Ashcroft, the court emphasized: "Where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality." 462 U.S. at __ (2526).

The regulation of domestic regulations is one area of governmental authority that

is reserved to the states. "Regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the states." Sosna v. Iowa, 419 U.S. 393, 404 (1975). The government that was created by the Constitution of the United States was not authorized to regulate domestic relations. Indeed, one thing which both the proponents and opponents of the Constitution agreed upon in 1787 was that the federal government should not have the authority to regulate family affairs. (Their disagreement was whether the Constitution, as originally written -- without any amendments-- was sufficiently clear in denying such power to the federal government.) Advocates of the Constitution, like Alexander Hamilton, argued that even without an express bill of rights the Constitution denied the

federal government the power to "penetrate the recesses of domestic life." 2 J. Elliott, Debates in the Seveal State Conventions on the Adoption of the Federal Constitution 268 (1876). Opponents, like Patrick Henry, argued that without a bill of rights the federal government would intrude into the privacy of the family. Id. at Vol. 3, p. 54. Of course, a Bill of Rights was adopted containing the tenth amendments which explicitly states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, [like the power to regulate family relations and define the extent of parental participation in the abortion decision of unemancipated children--LDW] are reserved to the States respectively, or to the people."

Only one part of the Constitution, the twerty-sixth amendment, refers in anyway

to emancipation of minors--and that concerns the age of voting in elections. It should not be forgotten that the twenty-sixth amendment was adopted after this Court properly invalidated a provision of the Voting Rights Act Amendments of 1970 which required states to allow 18-year olds to vote in state, as well as national, elections. Oregon v. Mitchell, 400 U.S. 112 (1970). In various opinions, the majority of the Court emphasized the propriety of state regulation, and the overwhelming majority of justices emphasized the inappropriateness of "judicial fact finding" as a substitute or replacement for legislative fact finding. Oregon v. Mitchell, Justice Harlan emphasized the particular competence of this state legislatures.

> I fully agree that judgments of this sort involved here are beyond the institutional competence and

> constitutional authority of the judiciary. . . . They are pre-eminently matters for legislative disgression, which judicial review, if it exists at all, narrowly limited. . . .
>
> Judicial deferences based, not on relative fact finding competence, but on due regard for the decision of the body constitutionally appointed to decide. . . . Assuming any authority at all, only when the Court can say with some confidence that the legislature has demonstrably erred in adjusting the competing interests is justified in striking down the legislative judgment.

Id. at 206-207 (Harlan, J., concurring).

Justices Brennan, White, and Marshall emphasized the inappropriateness of judicial fact finding about legislative facts.

> The nature of the judicial process makes it an inappropriate form for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn the legislative determination of a factual question, only if the legislatures' finding is so clearly wrong that it may be characterized as "arbitrary," "irrational," "or unreasonable." . . .

Id. at 247-48 (Brennan, J., concurring) see also id at 294-95 (Stewart, J., concurring) (inappropriateness of compelling state interest test).

Balancing the competing interests of concerned parents and their pregnant minor children regarding the minors desire to have an abortion is the type of function least appropriate for federal judges to engage in. The issue is essentially an issue of emancipation, and balancing competing interests. Any line that is drawn, wherever it is drawn, will be less than completely satisfactory, and, to that extent, susceptible of criticism. The drawing of that type of lines is most appropriate for legislatures, not judges. See generally, Rehnquist, We Are Family, Lawyers Stay Away, Nat'l L. J., July 28, 1980, at 15-16. It is inappropriate for the federal government including its

black-robed representatives, to intervene into the "realm of privacy" of the family. See generally J. Fishkin, Justice, Equal Opportunity and the Family 35-42 (1983); In re Polovchak, 104 Ill. App. 3d 203, 210, 432 N.E. 2D 873, 879 (1982), aff'd 454 N.E. 2d 258 (1983).

C. Parental Consultation Substantially Furthers Profoundly Important State Interests.

The notion that parental consultation is contrary to the best interest of minors in any significant number of cases is premised on an erroneous assumption. That erroneous assumption is that only children from "bad" homes get pregnant. The assumption is that if children came from "good" homes they would not become pregnant, in the first place, or if they did they would immediately rush to their wonderful parents to seek their advice and

counsel. That premise, which underlies the appellees' attack upon the Illinois statute, is grossly distorted and inaccurate.

Inasmuch as the professional literature providing overwhelming support for the principle of parental consultation in general, and its application to the abortion crisis in particular, was reviewed fully in the first brief filed by the amici, it will not be repeated here. We would, however, respectfully refer the court to pages 26-56 of our earlier brief. It will suffice, here, to note that, in general, minors who seek abortion come from more stable homes than minors generally (according to one study). They do not come from "bad" homes. Numerous studies have shown that, because of the centrifugal forces operative upon adolescence who are seeking to establish

their own identity, approximately half of all minors obtaining abortions will not consult their parents unless they are required to do so by law. It is undeniable that parental consultation reduces the physical and psychological risks of abortion for minors, and increases the prospect for parental support after abortion--when the minor desperately needs such support. (This Court should not forget that it has already seen one case in which a 17-year old high school student obtained an abortion without parental consultation; and although she was advised in writing to go to a hospital when labor began, she misunderstood the advice and delivered the fetus--after the injection of saline solution--alone in a motel bathroom. Simopolous v. Virginia, 462 U.S. 506, 508-09 (1983).)

Moreover, in light of the irrefutable evidence reviewed in that brief (pages 61-63) that statutory judicial bypass procedures operate simply as "rubber stamp" procedures for abortion clinics, it is ludicrous to suggest that the Constitution compels a judicial bypass procedure.

D. If Necessary the Court Should Reconsider Roe and Danforth.

The abortion decisions generally, and the application of them in the context of spousal or parental interests, has been stunningly inconsistent with the policy and value of the law in many other areas which protect the value and worth of prenatal life and support parental and spousal participation in significant life/crisis decisions. See generally Wardle, Rethinking Roe v. Wade, 1985 B.Y.U. L. Rev. 231, 252-55 (1985). In the

fourteen years since this court decided Roe v. Wade, there has grown an enormous body of professional (legal and scientific) literature recognizing the astounding prenatal life, vitality, capacity, and legal interests of the human fetus. Growing recognition of the biological and legal interests of prenatal human life and of the need to respect families--which provide for children blessings which the state is incapable to supply--necessitates reconsideration of Roe and its progeny. As Justice Brennan explained, for the court: "[t]he same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time." Arkansas Electric Cooperative v. Arkansas Public Service Commission, 461 U.S. 375, 391 (1983).

For these reasons, if the Court should conclude that the Illinois Act is unconstitutional under the abortion precedents the amici respectfully request the Court to reconsider the precedents and reformulate the doctrine into a more coherent and responsible standard.

IV. This Case Is Appropriately Before The Supreme Court On Appeal Under 28 U.S. §1254(2).

This appeal comes within the appellate jurisdiction of the Supreme Court under 28 U.S.C. § 1254(2). That section does not contain any congressionally-imposed requirement of "finality;" unlike other appellate jurisdiction statutes it does not even use the term "final." Compare 28 U.S.C. §§ 1252, 1291. Nevertheless, this Court has prudently construed § 1254(2) as permiting appeals only in cases involving final judgments. Thornburgh v. American

College of Obsetricians and Gynecologists, ___ U.S. ___, 106 S. Ct 2169 (1986).

Undoubtedly, the courts below have rendered "final" decisions upon several crucial issues of constitutional law. The district court held that the entire act was unconstitutional because it deemed the 24-hour post-notification waiting period to be forbidden under this Court's abortion precedents, because it deemed the judicial bypass provisions for expedited confidential appeal to be constitutionally insufficiently adequate, and because it concluded that there was "little remaining to sever which would have any operative significance" with these provisions stricken. Zbaraz v. Hartigan, 584 F.Supp. 1452, 58-59, 61, 64 (N.D.Ill 1984). The Court of Appeals for the Seventh Circuit agreed that the 24-hour waiting period was unconstitutional, and that the

"previously-notified" parent exception was invalid. Zbaraz v. Hartigan, 763 F.2d 1532, 37-39, 45 (7 Cir. 1986). The appeals court held that the requirement of mere parental notification was not unconstitutional, but it agreed that the Constitution requires a judicial bypass procedure for mere notification requirements; thus, it remanded that part of the judgment holding these provisions of the Act unconstitutional to await the Illinois Supreme Court rules to see if they assured sufficient confidentiality and expedition. Id. at 1544. However, the court of appeals affirmed the injunction against enforcement in the interim. Id.

The lower courts have rendered dispositive, final determinations (a) that a 24-hour post-parental-notification waiting period to give parents a minimum opportunity to consult with their minor

children seeking abortions is unconstitutional, (b) that judicial bypass procedures, including explicit provisions insuring expedited confidential appeal, are constitutionally mandated whenever a state requires parental notification before an abortion is performed, and (c) that such provisions in the Illinois Act are constitutionally defective at present and may not be enforced. Even under the most rigid interpretation of "finality," these decisions are final. See Catlin v. United States, 324 U.S. 229, 233 (1945).

Appellees have argued, however, that since the court of appeals remanded the case and directed the district court to retain jurisdiction while the Illinois Supreme Court promulgated the appeal rules governing waiver proceedings, the decision is not final. They are mistaken. First, they have confused "finality" with "total

resolution of all issues." Nothing in the this Court's interpretation of the statutory "finality" requirements necessarilly requires that all issues be disposed of before an appeal is taken. See generally Sears, Roebuck & Co. v. Mackey, 351 U.S. 421 (1952); Cold Metal Process v. United Engineering & Foundry Co, 351 U.S. 445 (1956); Seatrain Shipbuilding Corp v. Shell Oit Co., 444 U.S. 572 (1980); White v. New Hampshire Dept. of Economic Security, 455 U.S. 445 (1982).

Second, only by anticipating further activity (after the Seventh Circuit ruling) by the state (promulgation by the Illinois Supreme Court of rules displeasing to appellees) could it be said that any further proceedings in the trial court would even be necessary. Anticipation of what a party may or may not do in the future just as inappropriate

a basis for declining to exercise jurisdiction as it is for exercising jurisdiction. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983); Gully v. First National Bank in Meridian, 299 U.S. 109 (1936); Louisville & Nashville Railroad v. Mottley, 211 U.S. 149 (1908). (Appellees argument that the Illinois statute is "incomplete" does not help them; if that were true, the federal courts had no business hearing the case in the first place!)

Third, as a matter of policy, what remains to be determined, even if further rules are promulgated by Illinois is like the tail of the dog. See generally San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 645-46 (Brennan, J. with Stewart, Marshall and Powell, JJ., dissenting). To decline to review the case

now will shove the appellants into the twilight zone of ping-pong federal court procedures and create a rule reminiscent of Dicken's "Bleakhouse" proceedings. The finality rule should be given "a practical rather than a technical construction." Firestone Tire & Rubber v. Risjord, 449 U.S. 368 (1981).

CONCLUSION

The Illinois Parental Notice of Abortion Act strikes the finest balance of competing interest that is possible in the circumstances. The Act is well drafted, and contains six specific exceptions accommodating the general categories in which application of Act might create a constitutional problem. It provides adequately for expedited and confidential procedures both at the trial and appellate level for persons seeking judicial waiver

of its provisions. The decisions of the lower courts invalidating the Act are "final" and give this court appellate jurisdiction. Moreover, the lower court decisions are inappropriate and erroneous. This Court can, and should, reverse the lower courts decisions invalidating various provisions of the Act.

CERTIFICATE OF SERVICE

I, Lynn D. Wardle, a member of the Bar of the Supreme Court of the United States and counsel of record for amici herein, do certify that all parties required by the Rules of the Supreme Court to be served have been served, and that on June 22, 1987, I deposited three copies of this brief in a United States post office or mail box, postage pre-paid, addressed to Roma Jones Stewart, Solicitor General of Illinois, 100 W. Randolph St., 12th Floor, Chicago, IL 60601 (counsel of record for appellants), and Colleen K. Connell, Roger Baldwin Foundation A.C.L.U., 220 S. State, Suite 816, Chicago, IL 60604 (counsel for appellees).

Respectfully submitted June 22, 1987.

Lynn D. Wardle

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AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 85-673

In the Supreme Court of the United States

OCTOBER TERM, 1987

NEIL F. HARTIGAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ILLINOIS AND RICHARD M. DALEY, IN HIS OFFICIAL CAPACITY AS STATE'S ATTORNEY FOR COOK COUNTY, ILLINOIS; HIS AGENTS AND SUCCESSORS; AND ALL OTHERS SIMILARLY SITUATED,

APPELLANTS,

v.

DAVID ZBARAZ, M.D. AND ALLAN G. CHARLES, M.D., INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL ILLINOIS PHYSICIANS PERFORMING OR DESIRING TO PERFORM ABORTIONS AND ON BEHALF OF THEIR MINOR PATIENTS DESIRING ABORTIONS,

APPELLEES.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES BY The Judicial Consent for Minors Lawyer Referral Panel, An Organization of Lawyers Who Represent Pregnant Minors Seeking Judicial Consent to Confidential Abortions in Massachusetts

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QUESTION PRESENTED

Whether the judicial alternative to parental notification contained in §5 of the Illinois Parental Notice of Abortion Act of 1983 provides a constitutionally sufficient framework for ensuring a confidential bypass procedure and an expeditious appeal from the denial of a petition for waiver of parental notice?

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INTEREST OF AMICUS

This brief amicus curiae is submitted in support of appellees David Zbaraz, M.D., and Allan G. Charles, M.D.[1] The amicus is the Judicial Consent for Minors Lawyer Referral Panel, a volunteer organization of over two hundred Massachusetts lawyers who represent pregnant minors seeking judicial authorization to terminate their pregnancies pursuant to Massachusetts law, Mass. Gen. Laws Chapter 112, §12S. The present §12S was enacted in 1980, following this Court's decision in

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1/ This brief is filed pursuant to Rule 36.2 of the Rules of this Court. The Panel has obtained consent from both parties to submit this brief. Their letters of consent have been filed with the Clerk of this Court together with this brief. The Panel has filed an Appendix together with this brief to present to this Court data relating to the operation of the Massachusetts statute.

Bellotti v. Baird, 443 U.S. 622 (1979), invalidating a prior version of the statute. Since 1981, Panel attorneys have represented over 4,000 minors both before the Superior Court and in appeals from the denials of §12S petitions.

The Panel has, thus, had six years of experience with the Massachusetts statute in operation and is familiar with issues arising from its implementation, including those arising from the appeals process. Massachusetts law establishes procedures for access to the courts similar to those provided by the Illinois statute at issue here, and attempts to provide for confidential and expedited appeals through standards similar to those under the Illinois statute.

The Panel is primarily sponsored by the Women's Bar Association of

Massachusetts, Inc. The Panel has received funding from the Massachusetts Bar Association Foundation for the training of attorneys and from the American Bar Association for outreach to minors as well as a funding commitment from the Massachusetts Committee for Public Counsel Service for training purposes.

Prior to the law going into effect, Panel members met with the head of the Massachusetts Clerks Association to help draft forms and procedures for the hearings. A Steering Committee of Panel attorneys (including attorneys listed on this brief) has met monthly since §12S was implemented to facilitate the implementation of and to deal with problems arising under the law. Steering Committee members keep in regular touch

with Panel attorneys, review the hundreds of case summaries and affidavits prepared by Panel attorneys, run attorney training sessions, assist in appeals, prepare legal updates, and meet with clerks and judges concerning problems with implementation of this law.

These activities give the Panel a unique perspective on how the law actually works. This information is vital to a review of the operation of the judicial bypass system. The unequivocal experience of the Panel has been that the judicial bypass procedure fails to provide speedy hearings, creates a substantial burden on the minors, and fails to advance any legitimate state interest.

The Panel seeks to inform this Court about its experience with the

Massachusetts judicial alternative in operation and, in particular, about the efficacy, confidentiality and expedition of minors' access to the courts. The past six years of experience documents that, despite the diligent efforts of the Panel and of the Superior Court, and the oversight of the appellate courts, the judicial bypass alternative has at all stages of the bypass unduly burdened minors and delayed implementation of the abortion decision. These delays have postponed and thereby substantially increased the medical risks of the abortion procedure for many minors. For others, the delays have served as a de facto veto of the minor's decision to terminate her pregnancy.

SUMMARY OF ARGUMENT

This Court must affirm the judgment of the Seventh Circuit below, Zbaraz v. Hartigan, 763 F.2d 1532 (7th Cir. 1985), and hold unconstitutional the appeals provisions of the Illinois Parental Notice of Abortion Act of 1983. The Illinois Act, illuminated by Massachusetts experience with a comparable statute, fails to provide sufficient safeguards to assure that meaningful appeals will be available.

First, the Illinois statute, like the Massachusetts statute, speaks only generally of expedition, and does not fix any particular time period for resolution of appeals. Resolution of Massachusetts appeals from denials of §12S petition, together with the delays at the Superior Court level, result in time lags of seven

to twenty days; the statutory framework itself countenances potentially longer delays. This time lag makes it impossible for some minors to obtain abortions in Massachusetts at all and forces others to obtain abortions in the more dangerous second trimester, although their initial decision to obtain an abortion was reached in the first trimester.

Second, the bypass scheme as implemented in Massachusetts has failed to serve any legitimate state interest. The standards -- mature enough to give informed consent, on the one hand, or "best interests" on the other -- have proved elusive and unworkable. The hearings, in practice, are a rubber-stamp: they have identified only a handful of minors as immature, and, virtually without exception, an abortion

has been found to be in the best interests of these minors. The bypass scheme engenders significant delays, breaches of confidentiality and abusive questioning, and has severely handicapped minors in their efforts to implement their decisions to obtain abortions. The appellate process is powerless to cure these defects in the statutory scheme.

ARGUMENT

The Illinois statute will not withstand constitutional scrutiny when viewed by the light of experience with parental consent statutes in operation. This Court has, of course, considered the facial constitutionality of parental consent statutes several times, including the earlier Massachusetts law. See Bellotti v. Baird. See also City of Akron v. Akron Center for Reproductive

Health, Inc., 462 U.S. 416 (1983)(facial constitutionality of Akron ordinance); Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476 (1983) and Planned Parenthood of Missouri v. Danforth 428 U.S. 52 (1976) (constitutionality of Missouri law). This Court has not yet, however, reviewed such a statute based on evidence of its operation.[2] Enforcement of the Illinois

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2/ In Bellotti, the Court had no "evidence as to the operation of judicial proceedings under §12S . . ." or under any judicial bypass statute. Bellotti, 443 U.S. at 645 n.25 Similarly, in Ashcroft, a plurality of this Court noted that the Missouri statute provided a "framework for a constitutionally sufficient means of expediting judicial proceedings," but because the statute there, as is the case here with Illinois statute, had been enjoined prior to enforcement, "[n]o unemancipated pregnant minor has been required to comply with this section." 462 U.S. at 491, n. 16. The statute was upheld on the ground that there was "no reason to believe

(Footnote 2 continued on next page)

Act was enjoined before that statute took effect. Over six years of the operation of the Massachusetts judicial bypass statute, however, provides this Court with a "basis, besides judicial hunch," to hold that the Illinois statutory scheme will not, in operation, meet the statutory mandate to provide for confidential and expedited appeals and is therefore unconstitutional. Ballew v. Georgia, 435 U.S. 223, 231-32 n.10 (1978).

The determination that judicial bypass laws are facially valid does not preclude this Court from now finding that the law is unconstitutionally burdensome in its application. See Buckley v.

(Footnote 2 continued from previous page) that Missouri will not expedite any appeal consistent with the mandate in our prior opinions." Id.

Valeo, 424 U.S. 1, 97, n.131 (1976). See also Storer v. Brown, 415 U.S. 724, 740 (1974). A finding of facial validity made in the absence of a developed factual record may mask the potentially grave and unconstitutional burdens of a law. Therefore, "definite evidence must be adduced as to its operation in the circumstances for the purpose of demonstrating the constitutional infirmity." Bikle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. Law Rev. 6, 16 (1924).

Now that the actual facts regarding the effect of the judicial bypass are available, not merely assumptions regarding potential effects, it is incumbent upon this Court to move beyond

pure statutory construction. "[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." U.S. v. Carolene Products Co., 304 U.S. 144, 153 (1938). See also Block v. Hirsh, 256 U.S. 135, 154 (1921). A "principal justification for giving the independent review of legislation to the judiciary lies in the ability of the court to weigh constitutional claims on the basis of experience which was not available when the legislature acted." Karst, Legislative Facts in Constitutional Litigation, 1960 Supreme Court Review, 75, 76-77 (1960). Once evidence based on experience is available, the Court must move beyond a review of facial validity: "[t]he

existence of a permissible purpose cannot sustain an action that has an impermissible effect." Wright v. Council of the City of Emporia, 407 U.S. 451, 462 (1972).

The Court may go beyond the record and look to the Massachusetts experience for facts crucial to "an examination about how [the challenged practices] actually work." Ballew v. Georgia, 435 U.S. at 231-232 n.10. This Court may therefore look to the implementation of the Massachusetts statute when evaluating the constitutionality of the Illinois law.

I. THE ILLINOIS STATUTE IN OPERATION WILL NOT ENSURE MEANINGFUL, CONFIDENTIAL OR EXPEDITED APPEALS

Bellotti v. Baird, in invalidating the prior version of the Massachusetts statute, outlined the

constitutional limits of the ability of states to condition abortions for minors on seeking or obtaining parental consent. To protect a minor's privacy interests, a statute requiring parental consent must provide the minor with an opportunity to go directly to court, without involving her parents. The minor must have the opportunity to demonstrate to a court either that she is mature enough to consent to an abortion decision independently of her parents, or that the desired abortion would be in her best interests. Bellotti, 443 U.S. at 643. "The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to

be obtained." Id. at 644. See also Ashcroft, 462 U.S. at 491 n. 16 (state must provide procedure to "expedite" the appeal). Bellotti further noted that "the procedure must ensure that the provision requiring parental consent does not in fact amount to the 'absolute, and possibly arbitrary veto'" of the minor's decision. 443 U.S. at 644. Appellate review of lower court findings is one of the "safeguards" of the judicial bypass alternative. Id. at 645.

A. The Statutory Schemes

Sections 4 and 5 of the Illinois Parental Notice of Abortion Act of 1983 require a physician to notify a minor's parents of "his intention to perform [an] abortion," unless the minor has obtained judicial waiver of parental notice. Judicial waiver shall be available when:

> the court finds either (i) [t]hat the minor is mature enough to make the decision on her own, or (ii) [t]hat [parental notification] would not be in the best interests of the minor or incompetent.

Ill. Rev. Stat. ch. 38, ¶81-65(d). The statute imposes a fixed time limit between "application" and decision in the lower court; such proceedings:

> shall be given such precedence over other pending matters as is necessary to ensure that the Court may reach a decision promptly, but in no case shall the Court fail to rule within 48 hours of the time of application, provided that the 48 hours limitation may be extended at the request of the minor or incompetent.

Ill. Rev. Stat. Ch. 38, ¶81-65(c)(1985).[3]

3/ The Illinois statute does not define "application", so it is not clear whether this 48 hour time period commences with the minor's initial contact with the court to schedule a hearing, the filing of her application, or the hearing on her application.

The statute does not, however, make the forty-eight hour limitation, or any other fixed time limitation, applicable to rulings on appeals. The statute provides only, parroting the requirements of Bellotti and Ashcroft, that: "[a]n expedited, confidential appeal shall be available as the Supreme Court provides by rule, to any minor or incompetent to whom the circuit court denies a waiver of notice." ¶81-65(f) and (g). The statute does not identify how this requirement will be implemented, but requests the Illinois Supreme Court to promulgate rules "necessary to ensure that proceedings . . . are handled in an expeditious and confidential manner." ¶81-65. The United States Court of Appeals for the Seventh Circuit held that §§4 and 5 were not, in and of themselves,

sufficient to guarantee confidential and expeditious appeals. The Seventh Circuit enjoined their enforcement "until such rules are enacted and the Act can be reviewed in its entirety." Zbaraz v. Hartigan, 763 F.2d at 1541.

The Massachusetts statute, §12S, provides: "Proceedings . . . under this section shall be confidential and shall be given such precedence over other pending matters that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman." Mass. Gen. Laws c. 112, §12S.[4]

4/ In Massachusetts, appeals have been docketed in the Appeals Court either on the day that the Superior Court denies a minor's petition, or the following day. The statute at issue in Ashcroft, in contrast, provided for a five day period in which to docket the appeal. 462 U.S. at 491 n. 16.

The Massachusetts Supreme Judicial Court has promulgated guidelines for implementing §12S. Planned Parenthood League v. Bellotti, Massachusetts Supreme Judicial Court, Civil No. 81-124, slip op. at 2-3 (1981) at App.139. These guidelines affirm that "[t]ime is always of the essence in an abortion decision" and "promptness of administration" is a "preeminent consideration" of §12S. Id., slip. op. 3 at App. 141 and 142. Section 12S petitions shall be heard "on the same day as filing if practical," and "be decided as promptly as possible, and ordinarily within twenty-four hours or less." Id. at 5 and 7-8 at App. 143 and 145. "A petition should not be denied or a hearing delayed solely because the minor has not selected a particular clinic, hospital or doctor for

performance of the abortion." Id. at 8 at App. 145.

B. The Appeals Process In Operation in Massachusetts Has Been Neither Confidential Nor Expeditious, Nor Has It Served To Correct The Flaws In The Superior Court Process.

Notwithstanding the provisions of §12S and of the implementing guidelines, operation of the judicial bypass in Massachusetts has been neither expeditious nor confidential, nor has the appellate process served to correct the flaws in the underlying judicial bypass procedure. Since §12S was implemented in 1981, the Superior Court has denied minors' petitions in eleven cases, and appeals have ensued.[5] All of the appeals,

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5/ See In re Mary Moe, Mass. App. No. 86-1143 (Oct. 22, 1986) at App. 164; In re Mary Moe, Mass. App. No. 85-501 (May 14, 1985) at App. 161; In re Mary Moe, Mass. App. No. 85-103 (Jan. 29, 1985) at App. 1; In re Mary Moe, Mass. App. No. 85-15 (Jan. 10, 1985)
(Footnote 5 continued on next page)

with one exception, were either reversed or remanded to the Superior Court for reconsideration of the minor's petition.[6] In the one case where the decision was affirmed, on the basis of an inadequate record below, the minor went out of state to obtain the abortion after the Appeals Court had remanded the case. In re Moe, Mass. App. No. 82-425 (April 16, 1982) at App. 154.

(Footnote 5 continued from previous page)
at App. 160; In re Moe, 18 Mass. App. 727, 469 N.E.2d 1312 (1984); In re Miss Mary Moe, Mass. App. No. 82-425 (April 16, 1982) at App. 154; In re Moe, 15 Mass. App. 966, 446 N.E.2d 740 (1983); In re Mary Moe, Mass. App. No. 82-1058 (Sept. 27, 1982) at App. 155; In re Mary Moe, Mass. App. No. 81-1038 (Oct. 13, 1981) at App. 152; In re Moe, 12 Mass. App. 298, 423 N.E.2d 1038 (1981).

6/ See, e.g., cases involving remands: In the Matter of Moe, Appeals Court No. 81-1038 (remanded to the Superior Court); In re Moe, Mass. App. No. 82-425 (1982); In the Matter of Mary Moe
(Footnote 6 continued on next page)

The appeals process has itself, on occasion, created delays and inadequately protected the minors' confidentiality. In a 1986 case, for example, parents learned that their daughter had brought a §12S petition. In re Moe, 23 Mass. App. 902, 498 N.E.2d 1358 (1986).. They sought to reopen the hearing, which already resulted in a finding of maturity, to oppose her abortion. At the parents'-request a single justice of the Appeals Court stayed the order below and remanded "for a further hearing which affords counsel for the parents [the opportunity] to present evidence on the merits and for a determination . . .

(Footnote 6 continued from previous page) No. 85-15 (remanded to Chief Justice of the Superior Court); In the Matter of Mary Moe, Appeals Court No. 85-103 (remanded for a hearing before a different judge than had heard the original petition).

whether said parents have any standing to assert any rights in such a proceeding." 23 Mass. App. 902, 498 N.E.2d 1358. The full court then reversed, relying on the dictates of Bellotti v. Baird, that "every minor must have the opportunity . . . to go directly to a court without first consulting or notifying her parents." 498 N.E.2d at 1358, citing Bellotti, 443 U.S. at 647. However, seven days had elapsed -- during the eleventh week of the young woman's pregnancy -- between the initial hearing and final resolution of issues relating to the parents' intervention. More significantly, the courts breached the minor's confidentiality by confirming to her parents the existence and status of her petition.

Appellate delay is significant in the context of a minor's decision to terminate her pregnancy, and may mean that the minor loses her opportunity to abort, or that the medical risks of the abortion will be significantly increased. A young woman at the end of her first trimester at the time of the Superior Court hearing may be pushed into her second trimester by the time required to resolve the appeal; a young woman at the end of her second trimester at the time she seeks judicial consent may be foreclosed from terminating her pregnancy. The Panel has not studied the time period between the minor's initial application and ultimate decisions in those instances in which the Appeals Court has remanded the case to the Superior Court. However, remands have

occurred in several appeals, stretching the period necessary to resolve the minor's §12S petition even further.

Most significantly, these delays in the appellate procedure serve to compound far more pervasive problems in the underlying judicial bypass procedure. First, the minor's application to the Superior Court entails substantial delays. Once a Panel lawyer agrees to undertake representation of a minor, that lawyer schedules a hearing through the Superior Court clerks, who assign the matter to a particular judge sitting in the county selected by the minor and her counsel. In many cases there is a <u>seven day</u> delay before a hearing can be scheduled. Campbell Aff. at App. 23; Sabino Aff. at App. 71; Davidson Aff. at App. 46; Letter to Judge Lynch of

December 21, 1982 at App. 102. In the late summer, when many Superior Court judges are on vacation, severe scheduling problems have arisen each year. Ehrlich Aff. at App. 41; Spence Aff. at App. 80; Hollander Aff. at App. 54; Alper Aff. at App. 7. Because of the lack of available judges, many minors have been required to postpone their abortion appointments for a week, or longer. Even where hearings are scheduled by the court clerks, minors and their counsel have arrived at court to be told that none of the judges in the courthouse was available for a hearing. Sabino Aff. at App. 71.

Several additional factors combine to create scheduling delays. Many Superior Court judges recuse themselves from hearing §12S petitions on the basis of moral objections to abortion; others will

not hear petitions filed by minors beyond their first trimester of pregnancy.[7] Diamond, "Some Judges Shun Teen Abortion Cases", Patriot-Ledger, July 27, 1987, at App. 110; Sabino Aff. at App. 71; Brown Aff. at App.20, Nordwind Aff. at App. 62; Schick Aff. at App. 75; Chief Justice Morse Memorandum at App. 3. In one instance, the only judge sitting in a county refused to hear a petitioner's case because the woman lived in a neighboring county, and he "didn't want them coming here from all over the state." Fellman Aff. at App. 52.

7/ These recusals occur notwithstanding a memorandum from the Chief Justice of the Superior Court asserting that while he, like many Superior Court justices, finds §12S petitions to be "distasteful and repugnant to firmly held beliefs," he was directing each Superior Court justice to advise him of the steps taken to ensure that scheduling delays would not occur. Memorandum of Chief Justice, App. at 3.

Delays are compounded during the hearing by evidentiary requirements unrelated to application of the Supreme Judicial Court guidelines. Judges have suspended hearings to require minors to submit affidavits from a doctor verifying their pregnancy, Perry Aff. at App. 67; Blatchford Letter at App. 106; Starr Aff. at App. 82, or evidence that the clinic that had performed the pregnancy test was certified to do so. Stripinis Aff. at App 86.

Minors often have scheduling needs which the courts will not accommodate. Hearings have generally been available only at the beginning of the morning and afternoon sessions -- 9:00 a.m. and 2:00 p.m. -- times when most minors are in school. When one lawyer complained about the low priority given to §12S hearings,

the lawyer was told by the court clerk that "there was nothing he could do about it because he could not order judges to hear the cases or give them priority as the law requires." Campbell Aff. at App. 22.

The Superior Courts, too, have often failed to adequately safeguard minors' confidentiality. Superior Court judges have required minors to state their name and address on the record. Whitney Aff. at App. 93. In one instance a court clerk contacted the young woman at her home. Aff. of Mary Moe's Teacher at App. 59. In some courts, clerks and other court personnel blatantly and indiscreetly discuss the purpose of the pregnant minor's visit or ask the young woman explicit and personal questions in front of strangers. Letter from the

Woman's Bar Association to Chief Justice Lynch at App. 97. These problems cannot be cured by the oversight of the appellate courts.

Even after the minor has hurdled the initial difficulty in gaining access to the courts, she faces the additional trauma which the court procedure itself presents. The young woman, already anxious and emotionally troubled by the pregnancy, must undergo the stressful and seemingly punitive process of appearing before a judge and revealing personal and intimate details of her life.

The imposition of a judge's personal values is even more insidious than an outright denial of judicial consent, because the denials can be overturned by an appeals court. There is no remedy for harassment or inappropriate moralizing,

even if the Superior Court judge ultimately allows the minor to obtain her abortion. The scars from the anxiety and emotional trauma imposed by the court proceeding remain. See Cowan Memorandum at App. 28.

The judicial bypass proceedings can be especially difficult for minors who are in the custody of the Massachusetts Department of Social Services ("DSS"). Many social workers have told pregnant minors, contrary to DSS policy, that they are not allowed to assist the minor in going to court even if specifically requested. Sabino Letter at App. 166. Others incorrectly assert that they are not allowed to assist the minors with transportation to either the Superior Court hearing or the abortion facilty. Id. Still others refuse to accompany the

minor to the hearing and state they are not allowed to testify as to the young woman's maturity or best interests, even at the request of the minor or her attorney. Id.

These refusals to assist young women entrusted to the state create an extra layer of difficulty in using the judicial bypass proceedings for young women who already are significantly disadvantaged by the difficulties in their lives. A young woman in this group is often forced to seek an abortion through the judicial bypass proceeding because her parents are not available and DSS refuses to give consent. Id. In some cases where the parents did give consent, the minor was told that she had to obtain consent from DSS since it has legal custody. A pregnant minor in the custody of DSS thus

faces a double dilemma: DSS, as the custodial agent of the minor, will not give direct consent for the abortion nor will it aid her in seeking permission through the judicial bypass. Ehrlich Aff. II at App. 50. The burden imposed on these young women is especially acute because of the deficiencies in family support that forced their placement in state custody in the first place. These actions by the state social workers at times not only impede but totally block the young woman's ability to obtain a hearing and therefore her ability to obtain an abortion. Section 12S as applied to minors in the custody of the Department of Social Services imposes an unconstitutional burden on their right to seek an abortion because it restricts access to the courts.

C. The Illinois Statute Does Not Cure The Problems Which Have Occurred In Massachusetts

The delays that the Panel has encountered during the past six years in Massachusetts inhere in the Illinois statutory scheme. Nothing in the Illinois statutory scheme ensures that the breaches of confidentiality or protracted delays that have occurred at all stages of the Massachusetts §12S process will not occur in Illinois. The statute does not address scheduling delays in the lower courts and does not impose limits on the appeals court decision. Moreover, the Massachusetts experience demonstrates that the delays and burdens in the judicial bypass procedure cannot be cured by judicial or legislative oversight.

It is not clear from the Illinois statute whether the requirement that a petition be heard within "48 hours of the time of the application" begins with the initial application to the court for a judicial hearing or with hearing itself. If the period begins to run on the date of the hearing, the Illinois provisions for expedition will be subject to the same delays which plague the Massachusetts system. Further, no fixed time period governs resolution of appeals in Illinois; the Illinois courts are only required, under the statutory scheme, as are the Massachusetts courts, to "expedite" an appeal.

The delays inherent in the court process occur during the limited time period within which a minor may terminate her pregnancy. As this Court noted in

Bellotti the "abortion decision . . . simply cannot be postponed, or it will be made by default with far-reaching consequences." 443 U.S. at 64. "A pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." Id. Without any clear guidance as to the limits of the required expedition, resolution of a minor's petition for an abortion threatens to impose a delay period of such magnitude that the process itself may effectively veto the minor's decision, regardless of whether the court ultimately determines that the minor is sufficiently mature to give informed consent or that an abortion is in her best interest. Thus, the statute at issue places not only an "undue" burden

on a minor's termination of her pregnancy, but an insurmountable one.

II. THE MASSACHUSETTS GUIDELINES IN OPERATION HAVE SERVED NO MEANINGFUL PURPOSE

The parental consent law is intended to promote a state's legitimate interest in ensuring a woman's "informed consent" to the termination of her pregnancy:

> The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

Danforth, 428 U.S. 52, 67 (1976). See also Akron, 462 U.S. at 417 (the informed consent requirement is grounded on the "State's interest in protecting the pregnant woman's health," and is "primarily the responsibility of her physician.") The Massachusetts experience demonstrates that the courts

cannot afford to minors a procedure which is expeditious, confidential or accessible. Moreover, they have been unable to apply the constitutionally permissible inquiry in a way which serves the purpose behind the requirement of informed consent.

From the first this Court has acknowledged the ambiguity and lack of clear criteria in the informed consent standard, but was "content to accept, as the meaning, the giving of information to the patient as to just what would be done and as to its consequences." Danforth, 428 U.S. at 67 n.8. Leaving the informed consent standard deliberately open appropriately vests greater discretion in the physician: "[t]o ascribe more meaning than this might well confine the attending physician in an undesired and

uncomfortable straitjacket in the practice of his profession." Id.

The Supreme Judicial Court guidelines address the standards under which Superior Court judges are to make factual determinations of minors' maturity to give informed consent and -- for immature minors -- of what is in their best interests. As to maturity, the guidelines provide that a judge may inquire about the minor's "understanding of the nature, consequences and significance of her abortion choice," her age, school and work experience, history of mental illness, and whether her decision is a personal one. Slip op. at 6, at App. 143. The guidelines caution "that the judge should avoid the creation of the appearance of seeking to promote a particular set of moral values by

inquiring into the minor's or her parents' views as to the morality of the abortion; or into whether the minor considers a fetus to be an 'unborn child', or whether the minor believes she is in some way taking or destroying life." Id.

As to determining whether an abortion is in the best interests of a minor who has been found to be immature, the guidelines suggest that the Superior Court judge apply a "substituted judgment" standard. Application of this standard "essentially requires a court to determine what an incompetent person would choose were she fully competent, while bearing in mind her expressed choice and partial competency." Id. at 7 at App. 144. The guidelines provide that as to the best interests finding, "the

court may inquire into the minor's reasons for not seeking her parents' consent." Id.

In practice, Massachusetts Superior Court judges have used the §12S hearings to interrogate minors on a gamut of subjects, ranging from electricity to the tenets of the Catholic faith to the stages of fetal development. These inquiries are not reasonably related to the determination of whether a minor is mature in the sense of being competent to understand and to consent to her abortion. The hearings often convey to the minor the court's disapproval of her decision to terminate her pregnancy. Judges, possibly inadvertently, use a manner and tone more appropriate for dealing with criminals or seasoned litigators than with adolescent young

women pursuing their right to terminate their pregnancy. Athanasoulis Aff. at App. 12; Berge Aff. at App. 17.[8] One young woman was confronted by a judge's nonverbal indications that he thought she was crazy or mentally unstable. Beaton Aff. at App. 15.

Often the judge's personal prejudices toward abortion infect the hearing. Many judges force minors into a discussion of whether they consider the fetus viable. Nordwind Aff. at App. 63; Gamble letter

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8/ It is interesting to note that approximately 75 percent of Massachusetts minors seeking in-state abortions do consult their parents and obtain parental consent. Cartoof & Klerman, Parental Consent for Abortion: Impact of the Massachusetts Law, 76 Am. J. of Public Health 397, 398 (1986) at App. 117. It is only the remaining group -- the small group of minors who, by definition, lack family support -- who are forced to endure this conduct.

at App. 26. Others have pressured the young woman before them to marry or to charge her boyfriend with statutory rape. Athanasoulis Aff. at App. 12; Nordwind Aff. at App. 64; Cowan Memorandum at App. 28. One judge, who had himself adopted children, repeatedly tested a minor's awareness that many married couples want children but cannot have them. Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions, 15 Family Planning Perspectives 259, 265 (1983). Another asked a minor if she was bothered by having a dead child. Lenington Aff. at App. 57.

One judge elicited that a minor was Catholic and then grilled her on the Catholic Church's teachings on abortion, premarital sex, and contraception, repeatedly asking her to identify the

stages of fetal development. The judge berated the mother of the minors boyfriend for not making her son "keep his pants on." Transcript at App. 43; Gamble letter at App. 25. Another told the young woman that she was making a "very grave mistake which she would regret." Cowan Memorandum at App. 28. The impact of these hearings on minors cannot be corrected on appeal.

The Massachusetts experience with appeals of denials of §12S petitions further evidences the futility of implementing judicial bypass mechanisms to protect immature minors. Six denials were overturned because there was an insufficient factual basis for concluding that the minor involved was immature. In re Moe, 15 Mass. App. 966, 446 N.E.2d 740 (1983); In re Mary Moe, 15 Mass. App.

966, 446 N.E. 2d 740 (1983); In re Mary Moe, 83-392 (March 23, 1983); In re Mary Moe, 85-15 (Jan. 10, 1985); In re Mary Moe, 85-103 (Jan. 29, 1985); In re Mary Moe, 85-501 (May 14, 1985).

Statistically overwhelming numbers of minors pursuing §12S are found to be mature.[9] Thus, the standard in practice has failed to isolate any minors the judiciary is capable of protecting, and, indeed, in practice has only served as a vehicle for judicial overreaching. As Justice Stevens noted, concurring in Bellotti, the best interests standard

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9/ One study reports that 98.1% of minors seeking judicial consent were found to be mature. Pliner & Yates, The Massachusetts Judicial Consent Hearing: Is It a Rubberstamp Proceeding? (1986) in Brief Amici Curiae in Support of Appellees by the Certified Classes of Pregnant Minors Desiring Confidential Abortions in Minnesota and Massachusetts, February 12, 1987, Appendix B at 50a.

"provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores whose enforcement upon the minor -- particularly when contrary to their own informed and reasonable decision -- is fundamentally at odds with privacy interests underlying the constitutional protection afforded to her decision." 443 U.S. at 655-656, quoted in Planned Parenthood v. Ashcroft, 462 U.S. at 504 (Blackmun, J., dissenting). Inquiries similar to those implemented by the Massachusetts Superior Court, following the guidelines, are unlikely to result in any clear determination of a minor's "best interests" in choosing between abortion and carrying her pregnancy to term.

Parsing the standard expressed in the Supreme Judicial Court guidelines, it is difficult to conceive of an instance in which the best interest standard could properly be applied to deny a minor an abortion. If the best interests standard applies to the young woman's medical best interests, it is difficult to conceive of circumstances under which an abortion performed in a state-licensed facility will be more hazardous than pregnancy. If the best interests standard implies something more than medical best interest, no standards have been articulated other than the minor's "expressed choice", as well as the expressed choice of any parent appearing in support of the petition. It is not clear, what evidence of "best interests" would be constitutionally capable of

overriding the decision of the minor and her physician not to carry the child to term.

CONCLUSION

The state's legitimate interest in ensuring informed consent clearly does not confer on the state the power to deny a woman an abortion:

> [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

Danforth, 428 U.S. at 74. States are not free, despite "somewhat broader authority" to regulate minors, 428 U.S. at 74, under the guise of promoting legitimate state interests, "to intimidate women into continuing pregnancies." Thornburgh v. American

College of Obstetricians and Gynecologists, __U.S.__,106 S.Ct. 2169, 2178 (1986).[10] The §12S procedure while serving as a little more than a rubberstamp procedure unduly burdens minors in that it operates to deprive them of an effective opportunity to exercise their right to obtain an abortion expeditiously and in confidence. The Illinois statute, if placed in operation, threatens to incorporate all of the problems and burdens which the Panel has seen with the implementation of §12S in Massachusetts. The statute

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10/ The "right to privacy in connection with decisions affecting procreation extends to minors as well as to adults," Carey v. Population Services International, 431 U.S. 678, 693 (1977). Deterrence of minors' sexual activity is not a significant enough state interest to preempt minors' privacy rights. Id. at 715 (Stevens, J., concurring).

contains no fixed period for resolution of the minor's application to the courts. The statute does not clearly articulate the standards to apply in evaluating minors' petitions, and the statute does not address -- in any judicially comprehensible standards -- the circumstances under which a minor's petition to terminate her pregnancy may be denied.

For the foregoing reasons, this Court should affirm the judgment of the Court

of Appeals as to the Illinois appeals procedure.

Respectfully submitted,

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August 7, 1987

APPENDIX

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-673

In the Supreme Court of the United States

OCTOBER TERM, 1987

NEIL F. HARTIGAN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF ILLINOIS AND RICHARD M. DALEY, IN HIS OFFICIAL CAPACITY AS STATE'S ATTORNEY FOR COOK COUNTY, ILLINOIS; HIS AGENTS AND SUCCESSORS; AND ALL OTHERS SIMILARLY SITUATED,

APPELLANTS,

v.

DAVID ZBARAZ, M.D. AND ALLAN G. CHARLES, M.D., INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL ILLINOIS PHYSICIANS PERFORMING OR DESIRING TO PERFORM ABORTIONS AND ON BEHALF OF THEIR MINOR PATIENTS DESIRING ABORTIONS,

APPELLEES.

On Appeal from the United States Court of Appeals for the Seventh Circuit

APPENDIX TO BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES BY The Judicial Consent for Minors Lawyer Referral Panel, An Organization of Lawyers Who Represent Pregnant Minors Seeking Judicial Consent to Confidential Abortions in Massachusetts

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COMMONWEALTH OF MASSACHUSETTS

THE APPEALS COURT

A.C. 85-103

IN THE MATTER OF MARY MOE IMPOUNDED

TRIAL COURT: Suffolk

NO.: 73613

NATURE OF CASE:
MGL c 112, 12S

APPEAL BY:
Plaintiff

COUNSEL FOR PLAINTIFF

Helen Jo Goldstein, Esq
15 Court Square
Boston, MA 02108
(227-2082)

1 Jan 29, 1985: Appellant's Motion to Waive Docket Fee, filed.

Jan 29, 1985: Re: paper #1 - Allowed. By the Court.

2 Jan 29, 1985: Entered.

3 Jan 29, 1985:
MEMORANDUM AND ORDER - "The record of the proceedings in the Superior Court is manifestly inadequate. Neither the inquiry of counsel nor of the Superior Court judge approached an adequate probe of the mind, maturity, and best interests of the minor in this

case. The disposition by the judge is simply a check-off of the statutory conclusions without any factual findings, as required by G. L. c. 112, § 12S. The case is remanded for rehearing in the Superior Court before a different judge. At the new hearing, counsel's inquiry with regard to the issue of maturity at a minimum should cause to be placed on the record: where the minor has received guidance about the medical risks; where the minor has received guidance about alternatives to abortion; employment and other activities; responsibilities that she assumed. On the issue of the best interest of the child, we refer to the considerations enumerated in In the Matter of Mary Moe, 12 Mass. App. Ct. 298 (1981)." By the Court (Brown, Kass & Fine, JJ.). *Notice to Counsel and Attested Copy to Trial Court

[COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT DEPARTMENT
LETTERHEAD]

November 16, 1983

MEMORANDUM

TO: Regional Administrative Justices
Clerks of the Superior Court

FROM: Chief Justice Morse

SUBJECT: G.L. c. 112, § 12S petitions

1. Attached is a copy of a letter calling my attention to a problem in obtaining timely hearings on 12S petitions.

2. I request that each of you review procedures currently in effect in your region with a view to making sure that the rights of these petitioners under the statute are not lost by reason of delay on the part of the Court.

3. I am aware that many judges find these particular cases distasteful or repugnant to firmly held beliefs. I include myself in that number. Notwith-standing, I believe that my oath of office requires that I uphold the Constitution and laws of the Commonwealth and the United States.

4. Kindly advise me of what steps you have taken to address these concerns.

enclosure

[W.B.A./N.L.G. Lawyer Referral
Panel Letterhead]

January 10, 1984

The Honorable Thomas Morse
Chief Justice of the Superior court
New Courthouse
Pemberton Square
Boston, Massachusetts 02108

Re: The administration of M.G.L. Ch.112, §12S petitions

Dear Chief Justice Morse,

Thank you for responding so quickly to my letter of November 10, 1983 and please accept my apologies for the delay in getting back to your office. Unfortunately the holiday season for my office was filled with trials instead of cheer and other activities had to be curtailed.

The Panel appreciates your attention to the problems in scheduling the 12S appointments. Hopefully the memorandum that was sent to the regional justices will help to alleviate some of those problems. The Panel would also appreciate it if a copy of that memorandum could be forwarded to our office so that those issues might be reviewed.

We feel a meeting to discuss the issues and work together on the efficient administration of the law would also be

useful. The Panel is, of course, pleased by your willingness to schedule such a meeting. I shall call you [sic] office next week so that arrangements can be made.

I look forward to meeting with you in the future.

Sincerely yours,

/s/ Jamie Ann Sabino

Jamie Ann Sabino

JAS/me

AFFIDAVIT OF JANE K. ALPER

I, Jane K. Alper, depose and state as follows:

1. I am an attorney admitted to the practice of law in Massachusetts and have a usual place of business at 30 Newbury Street, Boston.
2. I am a member of the panel of attorneys that represents minors seeking judicial consent to an abortion under General Laws c. 112, § 12S.
3. On or about July 7, 1983 I called the Clerk's Office at Middlesex Superior Court to arrange for a hearing for a minor the following week. I spoke with William Johnston who was reluctant to schedule a hearing because he did not know which judges would be available. However, I requested a hearing date and was under the impression that one had

been scheduled for July 14 at 9:30 a.m.

4. I informed the minor to meet me at the courthouse on that date.
5. On July 14, at approximately 9:30 a.m., the minor, her friend, and I went to the Civil Clerk's Office. Mr. Johnston was not at his desk. His assistant, David Barry, told me that there was no record of an appointment having been scheduled and that he could not help me. He advised us to wait for Mr. Johnston whom he expected back momentarily. After almost an hour's wait, we rescheduled that hearing for July 16 at 9:30 a.m. because my client and her friend could not wait any longer.
6. On July 15 I received a message that David Barry had telephoned me. I returned the call and spoke with Mr. Johnston, who informed me that the hearing on July 16 would have to be cancelled because no judges were available to hear § 12S petitions. I explained to him that I had no way of contacting the minor, that she had an appointment to have the abortion performed that Saturday, and that Suffolk Superior Court was booked until the middle of the following week. Mr. Johnston stated that he was unable to assist me.
7. I then called Chief Justice Lynch's office and left a message asking that either the judge or his secretary call me on a matter of some urgency. My call was not returned.

8. I then contacted Judge Mitchell's clerk, Mr. Brennan, and explained the situation to him. Judge Mitchell was sitting in the Motion Session at Middlesex Superior Court that week. Mr. Brennan told me that he would speak to Judge Mitchell and get back to me. He called back several minutes later and told me that the judge would hear the petition the following morning.
9. As a result of the foregoing events, the minor was forced to make two trips to Cambridge from Waltham, missed a day's work, and suffered considerable anxiety and frustration.

Signed under penalties of perjury this 28th day of July, 1983.

/s/ Jane K. Alper
Jane K. Alper

AFFIDAVIT OF EMILIE F. ATHANASOULIS

I, Emilie F. Athanasoulis, do hereby depose and say

1. I am an attorney admitted to practice before the Massachusetts Bar. I am also a member of the Referral Panel that represents minors seeking judicial hearings under M.G.L. Chapter 112, §12S.
2. On April 1, 1982, I represented a minor in a 12S petition in Suffolk Superior Court.
3. The minor was seventeen and a half years old and eleven and a half weeks pregnant.
4. The minor had received counselling from trained counsellors on the abortion procedures and in addition I went over the procedure and possible complications with her.
5. The minor had a difficult relationship with her mother who had an alcohol problem and did not consult her mother. She was currently living apart from her mother because of the disruptive situation and was living in the home of her 21-year-old boyfriend's family, where she occupied a room separate from her boyfriend's. She was not in school but was working and supporting herself.
6. She did consult her boyfriend's parents and discussed the alternatives for herself relative to her pregnancy with both her boyfriend's mother and her boyfriend.

7. The Judge questioned the minor on her present situation, who she lived with, her job, what her boyfriend did, why she did not tell her parents, who she had discussed the situation with, if she had counselling and who supported her.
8. He also asked her to describe the abortion procedure and the possible risks.
9. The young woman answered all the questions adequately.
10. At the end of the questioning the Judge indicated that he was inclined to not only find the minor immature but that he had determined that it would not be in her best interest to have the abortion.
11. I pointed out to the Judge that the young woman was emancipated two years previously, supported herself and had had the maturity and foresight to leave a difficult family situation and enter a more supportive one.
12. The young woman indicated to the Judge that she did intend to try to go back to school and that she was attempting to establish a relationship with her mother again so that she might return home.
13. The Judge stated he was still not convinced that it was in her best interest and that he did not believe that she understood the procedure well enough.
14. I then took the minor out in the hall and spent some time reiterating the details of the abortion procedures and

discussing possible elaborations on her answers to the Judge's questions.

15. We re-entered the chambers and the Judge asked her to again describe the procedures and possible risks which she did.

16. He continued to ask her for more and more details on the procedure and details of her pregnancy.

17. He then began to ask questions such as when did she plan to get married, why not now and why should she wait instead of getting married now and having the baby.

18. The questioning in tone and repetitiveness reached the level of harassment.

19. My client was visibly upset but handled herself rather well.

20. I reiterated to the Judge the factors indicating maturity, in particular noting how she had supported herself, and that she was almost eighteen and that in a few months she would not need judicial consent for an abortion.

21. The Judge indicated he still did not think she was mature.

22. I then argued that the abortion would be in her best interests as she wished to re-enter school and was attempting to re-establish her family relationships and return home. I also pointed out that she was near the end of her first trimester and a delay might require into a second trimester abortion.

23. The Judge took almost a half hour to reach his decision after the hearing.

24. He found the minor not to be mature but that the abortion would be in her best interest.

25. The entire hearing and manner of this Judge upset my client and placed her under a great deal of strain.

26. After this hearing it was my judgment that attorneys on the Referral Panel should avoid hearings in front of this Judge in the future so as to avoid other minors being similarly upset and harassed.

27. I communicated this judgment to those persons in charge of monitoring the administration of the referral panel.

Signed under the pains and penalties of perjury.

/S/ Emilie F. Athanasoulis
Emilie F. Athanasoulis

August 8, 1983

AFFIDAVIT OF BRENDA A. BEATON

I, Brenda A. Beaton, under oath do swear and depose that:

28. I am an attorney being admitted to the Massachusetts Bar in December 1979;

29. During the period of August 1981 through February 1982 I had represented a number of minors in 12S Petition Hearings in the Superior Court Department;

30. The minors that I represented were residents of Essex County;

31. The minors wished to have their hearings in Essex County since they, with the rare exception, had difficulty obtaining transportation;

32. It is extremely difficult to obtain hearing dates in Essex County within four to five days of a request for such due to the judges sitting there;

33. Judge O'Leary who was sitting in Peabody refused to hear the Petitions;

34. Judge Bennet and Judge Donahue would not take any recess in a criminal trial to hear the Petitions;

35. While Judge Adams was sitting in Newburyport he would hear the Petitions, but the location of this Court was extremely inconvenient and, at times, impossible for minors to reach due to their lack of transportation;

36. One minor had to re-schedule her appointment for the abortion procedure three times due to the Court re-scheduling her hearing;

37. Justice Bennet was often the only Justice available to hear the Petitions;

38. On two separate occasions, Justice Bennet's procedures during the hearings did not correspond with the SJC

Guidelines set forth to determine a minor's maturity and what her best interests were;

39. The first of these two occasions involved an AFDC mother who was also a minor; Justice Bennet told her, after learning that she had only an eighth grade education, that she had a one-year old child, that she had been living away from her parents for over a year, that he believed that she had not been responsible and the he was finding her to be not a mature minor;

40. Justice Bennet then went on to state that it was in her best interests and "in society's best interest" that she had this operation;

41. While informing the minor that she was not mature, he tapped his head and said "you know";

42. This minor was extremely upset by the Justice's comment;

43. The second occasion involved a minor who had been in the custody of the Department of Social Services for most of her life;

44. This minor had had a previous abortion when she was twelve, but had become pregnant this time while on birth control;

45. The Justice did not ask enough of the appropriate questions to determine maturity before he found her to be immature;

46. When asked if this was her first pregnancy, the minor answered in the negative at which point I asked her to explain the circumstances of the present pregnancy;

47. Justice Bennet at this point said, in effect, that he was asking the questions and would not allow the minor to answer;

48. Justice Bennet found this minor to be immature and would not answer her question as to "why";

49. Justice Bennet then proceeded to state that he found it to be in the best interests of the minor and society that she have this operation;

50. The minor was visibly upset by the treatment that she received from the Justice;

51. After this second incident I informed the Health Care Law Committee of the Women's Bar Association that I would never bring a minor before Justice Bennet on a 12S Petition for I believed that they should not be subjected to his prejudicial attitudes and to his inability to decided these cases in a legal vacuum uninfluenced by his individual beliefs;

52. I took other minors into Middlesex County and Suffolk County for their 12S hearings due to the situation in Essex County regarding scheduling of hearings and Justice Bennet.

Signed under pains and penalties of perjury

Dated: 22 August 1983

/s/ Brenda A. Beaton
Brenda A. Beaton

AFFIDAVIT OF LEANNE BERGE

53. I am a member of the Massachusetts Bar and a lawyer on the referral panel for representation of pregnant minors seeking a court Order to obtain an abortion pursuant to G.L. c. 112, Section 12S. In this capacity, I have represented several minors before Superior Court judges.

54. On October 26, 1983, I represented one such 16 year old minor on a Section 12S petition. Superior Court Judge Herbert Abrams heard the petition.

55. Although we were told to arrive at the Clerk's Office at 1:45 a.m. in order to see the judge at 2:00 p.m., he was not ready to see us until 2:40 p.m.

56. The minor was scheduled for a 3:00 p.m. appointment with the clinic that was to perform the abortion. She had traveled from Martha's Vineyard that day and hoped to obtain the judge's order and the abortion on the same day. She was also very concerned that she might miss the last boat to Martha's Vineyard if her clinic appointment had to be postponed until later that afternoon.

57. When the judge was finally ready, he first questioned me off the record as to various facts about my client's background, while she waited alone in the court corridor.

58. The judge then had the Clerk call my client into the lobby and, after going on the record, he proceeded to question her from a pre-written document apparently designed to elicit information concerning "informed consent".

59. The judge interrogated the minor in a tone of voice normally used for interrogating criminals. When my client

spoke in a soft voice, the judge loudly admonished her to "speak up".

60. The Judge's questions included: "Do you speak and understand English?" (although it was clear that she already did), "Has anyone told you to get an abortion?" and other direct questions designed to elicit whether the minor was making a voluntary decision. There were no other questions designed to determine the minor's maturity or her best interests.

61. In summary, the judge's manner, tone of voice and choice of questions appeared to be more appropriate for accepting a criminal defendant's plea than for determining the rights of a minor seeking an abortion.

62. The judge signed the Order after finding on the record, in part, that there was "informed consent". A few hours later, however, I received a phone call from the clinic where the minor was to have the abortion performed. I was told by a person at the clinic that the judge had not made a specific finding on the Order as to the grounds for the Court's approval. The doctor was unwilling to perform the abortion under these circumstances.

63. I represented to the caller from the clinic what had transpired at the hearing and the caller seemed satisfied that the matter was resolved so that the doctor would acknowledge the Order as adequate. Presumably the doctor did do so and agreed to perform the abortion.

64. Because of this defect in the Order, however, there was a very good chance that the minor would not have been able to obtain an abortion and would have had to have another hearing to get an order that would be effective.

Signed under the pains and penalties of perjury this 28th day of October, 1983.

/S/ Leanne Berge
Leanne Berge, Esquire

AFFIDAVIT OF ASHLEY BROWN, ESQ.

I, Ashley Brown, Esq., after being duly sworn, hereby depose and state:

65. That I am a private attorney willing to take referrals to represent pregnant minors in G.L. c. 112, §12S petitions.

66. That on October 3, 1983, I received such a referral from Planned Parenthood in Cambridge.

67. That the minor was believed to be approximately 22 weeks pregnant.

68. That I called Suffolk Superior Court Civil Clerk's office to schedule a hearing pursuant to G.L. c. 112, §12S.

69. That I was advised by the clerk that there would be difficulty finding a Judge to hear the petition because several of the Judges sitting in Suffolk County for the October session had declined to hear G.L. c. 112, §12S petitions.

70. That I was later advised by the clerk that Keating, J. would hear the petition.

71. That I was advised by Planned Parenthood that Keating, J. had been very hard on minors during previous hearings and that he would not be an appropriate Judge to hear such a borderline case as the one in question.

72. That I was able to schedule the petition before Mitchell, J. sitting in Middlesex County because of a cancellation of another minor.

Signed under pains and penalties of perjury this 5th day of October, 1983.

/S/ Ashley Brown

ASHLEY BROWN
6 Beacon Street
Boston, MA 02108
(617) 523-4808

AFFIDAVIT OF JANICE CAMPBELL

I, Janice Campbell, affirm that on Wednesday, July 15, 1982, I was contacted by a minor seeking an abortion under M.G.L. c.112, §12S. On that same day, I called the Middlesex Clerk's office to set up an appointment for Thursday, July 16, 1982, and was told that the clerk was having difficulties finding judges to hear 12S cases, but that he would try to arrange a hearing for Thursday. We agreed that I would call Thursday morning at 8:30 to confirm the hearing before my client set out for the court. I was particularly concerned at having a definite time for the hearing as the non-consenting parent was an abuser and the minor and her mother were going to great effort to leave the house without his knowledge.

On Thursday morning, I called the Middlesex Clerk's office and was told that a hearing was set up for 11:30 and I so informed my client. At 11:30, we arrived at the court and were sent up to the Judge's lobby. At that point, his court officer came out and told us that the Judge had several other persons to see and could not hold the 12S hearing until 4:00 p.m. We returned to the clerk's office and the clerk then spent a great amount of time attempting to find another judge to hear the case. A little after twelve noon, one of the judges broke a trial for lunch and we were told that he would hear the case. We went upstairs to his lobby about three minutes after the break began, and were then told by his court officer that he had a jury coming in and could not hear the case

until 2:30, a time when I was unavailable. I then spoke with David Barry, the clerk, about the possibility of setting up a hearing on Friday, or on the following Monday, and he told me that he believed it would be equally impossible to find a judge willing to hear the case. At that point, I called the Suffolk Superior Court and received an appointment for Monday morning, July 19.

When the initial judge scheduled for the hearing had refused to hear the case and suggested that he would hear it at 4:00 instead of 11:30, I had called Chief Justice Lynch's office in Boston and spoken to Mr. Orfanello there to make him aware of the problem in Middlesex. He told me that there was nothing he could do about it because he could not order judges to hear the cases or give them priority as the law requires. He also told me that I should not complain since a judge was willing to hear the case at 4:00 p.m., although I explained that my client could not remain in Cambridge that long without arousing the suspicions of her abusive father.

On Wednesday, July 21, I received another minor abortion referral from Planned Parenthood, and again called David Barry at Middlesex to attempt to set up a hearing. He informed me that it would not be possible because of the judges' vacation schedule and the reluctance of judges to hear the cases. I therefore called Suffolk where I was not able to schedule a hearing until Tuesday, July 27, because of the overflow

of Middlesex cases going to Suffolk. My client then had to reschedule her clinic appointment for an abortion which had been scheduled for Monday, July 26.

I would add, for the record, that David Barry in Middlesex made every possible attempt to find judges for these hearings and has consistently been helpful and sympathetic in these cases.

/S/ Janice Campbell
Janice Campbell, Esq.

CAMPBELL, KING & BOROFSKY
82 Hancock Street
Cambridge, MA 02139
(617) 491-5463

Dated: July 28, 1982

[PPLM Letterhead]

Commission on Judicial Conduct
14 Beacon Street
Suite 102
Boston, Massachusetts 02108

Re: Associate Justice Augustus F. Wagner, Jr.

Dear Sir:

I am writing to advise you, and to complain concerning facts that would appear to constitute willful misconduct in office by Associate Justice Augustus F. Wagner, Jr., and that may constitute a breach of the Canons of Judicial Ethics.

The facts are entirely set forth in the enclosed two documents:
(1) Transcript of proceedings In The Matter of Mary Moe, Plymouth Superior Court, January 6, 1982, in connection with a petition for consent to an abortion under G.L. c. 112, § 125.
(2) Affidavit of Beryl Ann Cowan, Esquire.

The conduct described in these documents would appear to constitute a willful violation of Superior Court Amendment Standing Order No. 12-80, as it appears at 9 M.L.W. 129 (August 17, 1981). The subject of that Standing Order is stated in the Order to be as follows:

> Amending No. 12-80 (Uniform Procedures Re: Petitions for Abortion Authorization Under G.L. c. 112, §12S) to change the manner in which petitions in

Suffolk County shall be assigned and to include as an attachment suggested guidelines, originally set forth in Planned Parenthood League of Massachusetts v. Bellotti, No. 81-124 Civil (Supreme Judicial Court for Suffolk County; Liscos [sic], J. Single Justice) (June 16, 1981). The "Suggested Guidelines" attached to the Amended Study Order, and originally issued by Justice Liaso [sic] in a constitutional challenge to which we are a party, include the following: "the judge should avoid the creation of the appearance of seeking to promote a particular set of moral values by inquiring into the minor's or her parents' views as to the parents' views as to the morality of abortion; or into whether the minor considers a fetus to be an "unborn child, [or] as to whether the minor believes she is in some way taking or destroying life." In this regard, I call your attention to Supreme Judicial Court Rule 3:09, Canon 2(A) ("A judge should respect and comply with the law. . . ."); Canon 3(A)(1) ("A judge should be faithful to the law . . . ."). With regard to some of Justice Wagner's remarks to those present at the hearing, I call your attention to the same Rule, Canon 3(a)(3) ("A judge should be patient, dignified and

courteous to litigants, jurors, witnesses and others with whom he deals in his official capacity").

* * *

This matter was brought to our attention by the parties directly concerned because we provide a referral service for minors seeking judicial consent to abortion as an alternative to the consent of both parents. Planned Parenthood League of Massachusetts is one of the plaintiffs in pending constitutional challenges to G.L. c.112, §12S, which raise, among other issues, the burdensomeness of §12S proceedings as they are in fact conducted.

Our attorney, John H. Henn, assisted in the preparation of the text of the letter. Neither he nor I nor any other representative of Planned Parenthood League of Massachusetts was present at the hearing which is the subject of this letter, or have any personal familiarity with the facts as to what transpired. This letter is signed under the penalties of perjury. This matters discussed in this letter are not the subject of any judicial appeal.

Yours sincerely,
Nicki Nichols Gamble

cc: John H. Henn, Esquire

1/6/82

Memo to WBA File:

Today, I represented a fourteen year old minor before Judge Wagner of the Superior Court sitting in Plymouth County. The fact situation surrounding this case are as follows:

The 14-year old minor was impregnated by a 14-year old male. At the time that I met with the minor, she was approximately eleven weeks pregnant although the clinic felt that she was only ten weeks pregnant. The minor is a child of an alcoholic mother and disinterested father. The mother is in a continual state of drunkenness and the daughter's attempt to discuss her pregnancy with her mother was hindered by the mother's expression that she had no time to listen or talk to the daughter and instead threw her out of the home. The minor felt that she could not discuss the matter with her father due to her rather shabby relationship with him and that both of her parents' religious predilections would force her to keep the child. Coincidentally, the parents are undergoing a separation which is important only insofar as the child's understanding of their emotional situation at the time.

I was contacted originally by a woman, Mrs. Foy, who identified herself as the mother of the young man who had impregnated the minor. She told me that she had had difficulty obtaining legal

counsel (which is not true but which reflects the misunderstanding of the minor and the mother as to the referral process) and asked if she could come in to see me that afternoon. I met with the minor (and with Mrs. Foy upon the request of the minor that she remain present) and was rather struck by the maturity exhibited by this young woman. We extensively discussed her medical history, her home life, her job experience, her pregnancy, the steps that she had taken in pursuit of an abortion and I found that, in all respects, this young woman understood very comprehensively the decision that she was making and exhibited the emotional maturity far and above the average 17-year old client which I have represented pursuant to this statute. The feedback and support of Mrs. Foy, I believe, was paramount to this young woman's feeling that she was making a wise decision for herself and seemed to create a stabilizing force for all of the actors in this drama. Following our meeting, I made an appointment with Judge Wagner to appear at 11:00 a.m. on Wednesday, January 6, 1982.

I met with my client at 10:30 a.m. and was forced to wait for the Judge for over an hour, meaning I did not meet with him until approximately 12:05 p.m. During the waiting period, I, once again, extensively discussed with my client and with Mrs. Foy the issues related to teenage sex, contraception, etc. and felt that my client and this woman were very prepared to participate maturely and effectively in the proceeding which was

to follow. I would like to emphasize that I did no feel that mrs. Foy should or would be required to identify herself or otherwise participate in the hearing but rather that she was only to go in to this hearing as a supportive force for this young woman.

The events which transpired in the Judge's lobby were unsettling, unjust, and, in my opinion, entirely illegal. The Judge requested the age of the minor and birth date. Upon hearing that the woman was 14 years old, he took a tactic which was entirely unreasonable. First of all, he ascertained whether or not and how she had obtained the results of her pregnancy test, the date that she had been tested and whether or not she believed by her own records that she was 10 weeks pregnant as she stated. The next question which he asked was her religion. Upon hearing that the minor was Catholic, he asked her whether or not she realized (or he insinuated) that abortion was not recognized by the church. Continuously throughout the hearing, the Judge asked the woman if she was prepared to deal with the religious consequences of seeking an abortion. Throughout the hearing, the woman affirmatively answered yes. He then asked her whether or not she was willing to deal with the moral aspects of having an abortion. Again, she answered yes. Later he asked her whether or not she was willing or sure that down the road she would feel that she had done the right thing religiously and morally. Again, she answered yes. After he asked her who she had consulted with relative to her

decision, he started yelling at Mrs. Foy. He also, upon hearing that the minor had spoken to five adults and asked whom each was, he asked if she had spoken to her priest. I would like to say, at this point, that all of the questions which I've already stated and those which will following were vociferously objected to by me throughout this hearing and that at each point, I was overruled without the Judge even waiting to hear why I was objecting.

Other questions which I found offensive were the Judge's saying when my client said that she did not understand a question, which, parenthetically, I did not understand either, that she was mature enough to answer it and that she must understand it if she was found to be mature. He asked the woman what kind of family she came from so that she was free to be out at night having sex, never asking when the sexual event occurred. He also asked the woman why society should take the responsibility for her abortion. He also told her that she had no business at the age of 14 having sex. The woman at that time responded that first of all, she did not plan to have sex in the future and two, that did not feel that sex was wrong if you loved the person. The Judge then responded with the comment that at the age of 14, she nor her boyfriend understood what love was.

The Judge also asked her repeatedly if she realized that she was killing a fetus and that at the age of 11 weeks, the fetus had eyes and other

characteristics resembling a child. The other objectionable questions to this questioning will be reflected in the transcript. It is rather important to note that the Judge then at some point during the hearing, asked Mrs. Foy to be identified. When she was identified as the mother of the boyfriend, he said to her "Oh, you're a really great mother" in a very derogatory manner and he kept referring to her as "great mother". During that time, he asked her why she allowed her son to be running around irresponsibly, what kind of home he came from, etc. He also said to her outright that it was between her and her husband to deal with their son to make sure that this behavior stopped and yelled at her to make sure that her son "keeps his pants on". I would also like to add that the Judge neither listened to the mother or to this young woman but terrorized them to the extent that both women left the lobby crying.

Permission for the abortion was granted. Before the termination of the questioning, the Judge informed us that he would give permission for the abortion but he continued to harrass both the mother and the minor for an additional five minutes telling the girl that she was never to have sex again and telling the mother that she better start taking some responsibility for the action of her son. It's also very important to note that the Judge made very negative comments to the minor relative to her home background asking why she was not at home and likewise why the boyfriend was not at home and that how did they have

time to have sex. Demonstrations by the mother that the children were always at home and that both children slept at home was ignored.

I am willing to take any action that is required to stop the kind of questioning and harrassment that women before Judges who have similar beliefs as Judge Wagner, are forced to endure.

/S/ Beryl Ann Cowan
BERYL ANN COWAN

COMMONWEALTH OF MASSACHUSETTS
PLYMOUTH, SS SUPERIOR COURT

* * * * * * * * * * * *
In the Matter of *
*
MARY MOE, *
Petitioner *
* * * * * * * * * * * *

Before: WAGNER, J.

APPEARANCES:

BERYL ANN COWAN, ATTORNEY
Lodolce and Epstein
232 Main Street
Brockton, MA 02401
On Behalf of the Petitioner

Superior Court
Plymouth, Massachusetts
Wednesday, January 6, 1982

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Plymouth Superior Court
Civil Session
Plymouth, Massachusetts
Wednesday, January 6, 1982

Proceedings

(Lobby Conference)

MARY MOE, Sworn

THE CLERK: Your Honor, I believe Attorney is counsel during this and has been asked to be appointed by the Court.

THE COURT: All right. I'll appoint you as counsel, Ms. Cowan.

MS. COWAN: Thank you, Your Honor.

THE COURT: Young lady, I'm going to put some questions to you. If you don't understand any particular question, please indicate it.

Naturally, you can have the assistance of your counsel in answering the questions.

Your age and date of birth, please?

MS. MOE: I'm 14. 5/13/67.

THE COURT: All right. And how many weeks do you understand yourself to be presently pregnant?

MS MOE: Ten.

THE COURT: Ten weeks. And how did you determine it was ten weeks?

MS. MOE: Well, I had a test taken down at Family Planning in Brockton.

THE COURT: All right. When was that test taken?

MS. MOE: A month ago.

THE COURT: All right. And was it ten weeks at that time or ten weeks at this point in time today?

MS. MOE: No. It was six weeks then.

THE COURT: All right. And does that coincide with whatever records you have or your recollection of the circumstances?

MS MOE: I didn't understand the question.

THE COURT: Well, do you have any records of your condition prior to believing that you had become pregnant?

MS. COWAN: Do you understand?

MS. MOE: (Shaking head.)

MS. COWAN: May I?

THE COURT: You may assist me. I am suffering from the flue, so as few words as I can save, I'll be happy to do so.

MS. COWAN. Thank you, Your Honor.

He's saying that do you think you're ten weeks pregnant by your understanding?

MS. MOE: I'm a little, I think I'm a little more.

THE COURT: All right, what do you think is a little bit more?

MS. MOE: Eleven

THE COURT: I see, all right. How far have you gone in school?

MS. MOE: Ninth grade.

THE COURT: All right. What type of course are your pursuing? Are you still enrolled in the school at this time?

MS. MOE: Ah-hum.

THE COURT: All right. And have you discussed this matter, are you living with your parents.

MS. MOE: Yes.

THE COURT: Are they your natural parents?

MS. MOE: Yes.

THE COURT: Have you discussed this matter with either your mother or your father?

MS. MOE: No.

BEST AVAILABLE COPY

THE COURT: Do you have any reason why you haven't discussed it with either one of those two parents?

MS. MOE: My mother is an alcoholic and I tried to tell her about it and she just said she didn't have the time to talk to me and she told me to get out of the house.

So, I just didn't try again.

THE COURT: All right, what about your father?

MS. MOE: I didn't tell my father because, well, me and him we don't talk. And they're, well, they're trying to get a separation.

THE COURT: Is he living at home at this time?

MS. MOE: Yes.

THE COURT: Have you received any counseling regarding your condition; what options are available to you. Do you understand that abortion, naturally, is one option, putting a child up for adoption, or having the child in your own custody is also another option.

MS. MOE: (Nodding head.)

THE COURT: Have you gone to counseling service or been counseled by anyone?

MS. MOE: Ah-hum.

THE COURT: Regarding those options?

MS. MOE: Yes.

THE COURT: And what service or person did you go to?

MS. MOE: Mary Lou O'Brien.

THE COURT: And what does Mary Lou O'Brien do? What's her relationship to you?

MS. MOE: She's just, you know, I just went to her and talked to her.

MS. COWAN: Who is she?

MS. MOE: She's a counselor.

MS. COWAN: Where?

THE COURT: And where is she a counselor?

PARTICIPANT: Family Resources.

THE COURT: Is this Mary Lou O'Brien?

MS. MOE: No.

THE COURT: All right.

MS. MOE. Family Resources in Brockton.

THE COURT: And did you discuss with Miss O'Brien the options that are available to you?

MS. MOE: Yes.

THE COURT: And did you discuss with Ms. O'Brien what an abortion is all about?

MS. MOE: Yes

THE COURT: And what's your religion, young lady?

MS. MOE: Catholic.

THE COURT: All right. Have you considered the religious issues that relate to an abortion?

MS. MOE: Yes.

MS. COWAN: Your Honor, I think my client's forgotten to tell you some of the other people that she saw in counseling.

THE COURT: All right.

MS. COWAN: Tell the Judge who else you've spoken to.

MS. MOE: I've spoken to Merrill, her husband, her son ---.

THE COURT: Well, who is Merrill?

MS. MOE: That's my boyfriend's mother, that's her. I talked to my girlfriend and her mother and father.

THE COURT: All right.

MS. COWAN: And what about me?

THE COURT: Did you talk to your attorney?

MS. MOE: Yes.
THE COURT: Have you been employed at all? I would assume probably not that much. You're only 14 years old at this time?
MS. MOE: Yes, I was.
THE COURT: When have you been employed?
MS. MOE: Last summer I was.
THE COURT: What did you do for work?
MS. MOE: I cleaned buildings.
MS. COWAN: Also babysitting.
MS. MOE: Also babysitting.
THE COURT: What are you future plans with regards to your education and employment?
MS. MOE: Well, I want to finish school. I want to be an L.P.N.
THE COURT: All right. You say you considered the religious aspects of having an abortion?
MS. MOE: Ah-hum.
THE COURT: Have you discussed that with a priest or any other person in the church?
MS. MOE: Oh, no.
THE COURT: Have you considered what lingering doubts you may have down the long road after having an abortion?
MS. MOE: Yes
THE COURT: And you're satisfied that you can mentally accept not only any religious philisophy you may have that relates to abortion but any moral feelings that you may either have now or at a later time?
MS. COWAN: Do you understand the question?
MS MOE: No.
MS. COWAN: He's just saying - I'm not sure I understand it.

THE COURT: Why don't I break it down. Have you considered carefully any reflections that you may have at a later time regarding your religion as a Catholic and the fact that the Catholic religion prohibits abortions?
MS. MOE: Ah-hum.
THE COURT: Have you considered the possibility that at a later time you may have certain moral questions in your own mind regarding having an abortion?
MS. MOE: Yes.
THE COURT: You're satisfied that you still want to go forward with an abortion?
MS. MOE: Ah-hum.
THE COURT: And you've given that full consideration?
MS. MOE: Yes.
THE COURT: You're satisfied that's in your best interest?
MS. MOE: Ah-hum.
THE COURT: And how old is the young man that was involved with you in this set of circumstances?
MS. MOE: Fourteen.
THE COURT: Have you discussed your situation with him?
MS. MOE: Ah-hum.
THE COURT: What's your thinking on your further conduct after today; sexual conduct?
MS. MOE: We'll, you know, we've decided that after this, we just, you know, we're not going to go - we're going to try to start over again.
THE COURT: We'll, do you think you should have a right to go back to the Courts, and never mind the Courts, the

right to just have an abortion because you want to go about having sexual relationships outside of marriage at your age?

MS. COWAN: Your Honor, may I be heard a minute? I've spoken with my client about the fact that after she seeks her abortion, if you grant her permission to do so then she will undergo counseling at Pre-Term Clinic which will provide her with any contraceptive information that she might need, and that's both natural methods as well as pharmaceutical. And I think that my client understands, at least from our conversation that if she decides to engage in sexual conduct at any time in the next few years, that she will abide by their precautions.

THE COURT: Well, putting all of that aside, young lady, what's your feeling o a person 14 years old having sex with or without devices that would prevent pregnancy?

Do you think that you should be having sex at your age without benefit of marriage?

MS. MOE: Well, it's really - like, I've talked to other people. They say, like, I think it's the way you feel about the subject and how you feel about each other.

THE COURT: At 14 years of age you're telling me that.

MS. COWAN: Your Honor, hopefully ---

THE COURT: I think, I would hope down the long road, young lady, even though I'm going to allow your petition, that you use a little more discretion and though to having sex. At 14 years of age, what are you doing out in a position

where you could have the time for that type of thing? Do you go home at night?

MS. MOE: Yeah.

THE COURT: What about your boyfriend?

You're the mother of the fellow involved in this set of circumstances? When's he go home at night?

PARTICIPANT: Always home.

THE COURT: Well, he ought to stay home and keep his pants on, where he belongs.

PARTICIPANT: You're not telling me anything that I haven't ---

THE COURT: Well, if I had my way, good mother to this young man, both these children maybe deserved something from society. Why should society have the moral obligation of allowing an abortion for you in these circumstances?

MS. COWAN: Your Honor, I think ---

THE COURT: I don't need to hear from you counselor, apparently your client can understand the question.

MS. MOE: I don't understand what you said.

THE COURT: Well, do you understand that you're asking me to allow an abortion and eventually, I suppose, somewhat deciding not only your life, but depending on how you look at it being 11 weeks down the road. Do you understand how developed the fetus is now that is presently inside you?

MS. COWAN: Your Honor, I object. I don't think ---

THE COURT: Overruled.

MS. MOE: Yes.

THE COURT: You've given that thought? You've given thought to the fact that 11 months the fetus has eyes;

do you understand that? Is developed?

MS. COWAN: Your Honor, I have to object.

THE COURT: You can object all you like. I have every right to explore maturity, counselor.

You note your objections and I'll ask the questions.

Do you understand that?

MS. MOE: Yes.

THE COURT: You've given that due consideration?

MS. MOE: I've talked.

THE COURT: All right, I'm going to allow the petition.

MS. COWAN: Thank you, your Honor.

THE COURT: Let me say to you, young lady, at 14 years of age, you shouldn't be out having sex with anyone under any circumstances. If you think love occurs at 14 years of age, you better start looking hard in the mirror.

And to you, good mother, who comes here on her behalf, you ought to take junior home and between yourself and his father straighten him out a little bit.

MS. COWAN: Thank you, Your Honor.

(Whereupon the Chamber Conference ended.)

CERTIFICATE

I, Edna O'Brien Talbert, Verbatim Stenomask Stenographer, do hereby certify that the foregoing records, Pages 1 through 15, is a complete, accurate and true transcription of my cassette tapes taken in the aforementioned matter to the best of my skill and ability.

_____

EDNA O'BRIEN TALBERT

THE FOREGOING CERTIFICATION OF THIS TRANSCRIPT DOES NOT APPLY TO ANY REPRODUCTION OF THE SAME BY ANY MEANS UNLESS UNDER THE DIRECT CONTROL AND/OR DIRECTION OF THE CERTIFYING REPORTER.

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AFFIDAVIT OF KAREN DAVIDSON

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY

Karen Davidson, being duly sworn, deposes and says as follows:

1. I am an attorney admitted to practice law in the Commonwealth of Massachusetts since December 15, 1978.

2. I am a member of the Lawyer's Referral Panel of the Women's Bar Association and in that capacity I have represented minors under M.G.L. Ch. 112 § 12s.

3. Early on August 1, 1983, I called Mr. William Johnston's phone number at the Middlesex County Courthouse and requested to speak with someone concerning a § 12s case. Ms. Jo Anne Spears took my call. I advised her that I represented a minor in need of an emergency § 12s hearing before a Judge and requested a hearing as soon as possible. Ms. Spears told me they were booked for the entire week and no hearings were available. I explained to Ms. Spears that this particular minor was close to the end of the second trimester and urgently needed a § 12s hearing. Consequently, I requested a hearing within the 24 hour period that § 12s allows for or as soon thereafter as possible. Ms. Spears consulted with someone else but returned to state that no more hearings were available that week and declined to give me any appointment that entire week.

4. I have contacted Mr. William Johnston approximately once a month in

the past year and one-half seeking § 12s hearings. Routinely, I have been forced to wait three (3) to seven (7) days for a hearing appointment or have been told to call elsewhere. When I have appeared for a § 12s hearing appointment in Middlesex, most recently on May 11, 1983 and June 29, 1983, I have had to wait for extended periods for my papers to be processed and have received no cooperation from Mr. Johnston in my attempts to expedite the process.

/s/ Karen Davidson
Karen Davidson

August 2, 1983

Then came before me the above-named Karen Davidson and made oath that the foregoing Affidavit is true.

[signature illegible]
Notary Public

My commission expires: 1/23/87

AFFIDAVIT OF J. SHOSHANNA EHRLICH

I, J. Shoshanna Ehrlich, under oath do depose and say as follows:

1. That I am an attorney admitted to practice in the Commonwealth of Massachusetts.

2. That I am an active member of the Referral Panel of attorneys which was established by the Women's Bar Association and the National Lawyer's Guild Women's Committee in order to provide representation for minors seeking judicial consent for an abortion pursuant to Massachusetts General Laws Ch. 112, § 12S.

3. That on August 8, 1983, a counselor from the Planned Parenthood League of Massachusetts called me to ask if I could represent a minor on a 12S petition. I agreed to provide representation for her.

4. That later that day, the minor contacted me to discuss setting up an appointment. I learned she was ten (10) weeks pregnant.

5. That I then called the Middlesex Superior Court to schedule a hearing with a judge. The clerk, Mr. Bill Johnston, informed me that three judges were sitting in Middlesex that month who were potentially available to hear 12S petitions, but that one had recused himself and that one was very reluctant to hear them. He told me that I could make an appointment but it would be "potluck". I asked him what that meant and he said that he could not promise that a judge would actually be available at the scheduled time to hear the petition. I again told him the minor was

ten (10) weeks pregnant, he said this in no way would help to insure that a judge would be present, notwithstanding our appointment.

6. That I then called Suffolk Superior Court and was told that we could not get an appointment for seven (7) days. I emphasized that the minor was ten (10) weeks pregnant and was again told that this made no difference we could simply not be heard sooner.

Sworn to under the pains and penalties of perjury on this 9th day of August, 1983.

/s/ J. Shoshanna Ehrlich
J. Shoshanna Ehrlich

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, ss

Then personally appeared before me the above-named J. Shoshanna Ehrlich and swore to the truth and accuracy of the foregoing to the best of her knowledge and belief.

/s/ Lynne D. Dahlborg
Lynne D. Dahlborg
Notary Public
My Commission Expires:
5/16/86

AFFIDAVIT II OF J. SHOSHANNA EHRLICH

I, J. Shoshanna Ehrlich do depose and say:

1. That I am an attorney in good standing duly admitted to practice in the Commonwealth of Massachusetts.

2. On or about May 1, 1987 I was called by Planned Parenthood to see if I would be available to take a minor to court for a judical bypass hearing.

3. The counselor told me the minor was fourteen years old and in the custody of the Department of Social Services having been physically and sexually abused by her stepfather. She was at the time living with a foster family.

4. I agreed to take the case and made an appointment for a court hearing at the Middlesex Superior Court for the following Monday at 9:30 a.m.

5. Arrangements were made with the minor for her to meet me at the courthouse at 8:30 a.m.

6. I arrived at the courthouse at 8:30 a.m. By 9:00 there was still no sign of the minor. I called Planned Parenthood and they had not heard from her.

7. At about 9:15 a.m. I was paged by the page operator. The minor's intake worker was on the phone to tell me that the minor had run away from the foster home the day before.

8. The worker told me she had asked her supervisor for permission to simply drive the minor to court, as she feared the minor was feeling too overwhelmed and scared to negotiate getting there on her own. The supervisor refused permission and the worker did not feel she could go over her supervisor's head. The worker connected the running to her fear of going to Court especially on her own with no support.

9. I called Planned Parenthood about two weeks later to see if they had heard from the minor. As of that date they had not.

Signed under pains and penalties of perjury.

/S/ J. Shoshanna Ehrlich
J. Shoshanna Ehrlich

Attorney at Law

AFFIDAVIT OF PETER J. FELLMAN

I, Peter J. Fellman, Esq., under oath, hereby depose and state as follows:

1. That I am an attorney admitted to practice before the Supreme Judicial Court of the Commonwealth, having been admitted to practice on December 17, 1981.

2. That I currently serve on a panel of attorneys providing counsel to indigent minors pursuant to the requirements of M.G.L. Ch. 112, Sec. 12 S.

3. That in providing counsel to minors pursuant to the requirements of the General Law above stated, I have encountered the following difficulties:

a) On August 11, 1983, Associate Justice John D. Sheehan, sitting before the Superior Court, Norfolk County, Dedham, stated, In Re Mary Moe #79, Docket No. 140543, that he did not wish to hear the petitioner's case as he had discovered that the petitioner was not a resident of Norfolk County, stating, he "didn't want them coming here from all over the state". The Justice, though he did hear the petition, stated that he did so only because petitioner and her counsel had come a long distance.

b) That due to scheduling of vacations and other judicial obligations, it has become necessary to have petitioners wait for somewhat extended periods (as long as a week) for appointments for hearings, or in the alternative, travel to outlying counties to have their petitions heard.

4. That I feel, based on knowledge and belief, that these occurrences have

presented a burden upon the petitioners' rights as allowed by decisions of the Supreme Court of the United States and the Supreme Judicial Court of the Commonwealth of Massachusetts.

Signed under the pains and penalties of perjury,

DATED: August 17, 1983

/s/ Peter J. Fellman
Peter J. Fellman, Esq.
WEBER and FELLMAN
40 Court Street, Suite 920
Boston, MA 02108
367-1898

AFFIDAVIT OF FREDDA HOLLANDER

73. I, Fredda Hollander, am an attorney admitted to practice in the Commonwealth of Massachusetts. I am a partner in the firm of Lee & Hollander, 50 Milk Street, Boston, MA 02109.

74. I have represented approximately six minors in Chapter 112, Section 12S hearings since March, 1982. Those hearings were in Suffolk Superior Court.

75. Between March, 1982 and June, 1982, I had no difficulty in scheduling Section 12S hearings in Suffolk Superior Court. The hearings were scheduled through Mrs. Betty Moore.

76. On Wednesday, July 12, 1982, I called Mrs. Moore to schedule a Section 12S hearing for a minor who was fourteen weeks pregnant. I was not able to schedule an immediate hearing and was scheduled for a hearing one week later, on July 28, 1982. Mrs. Moore indicated that July 28, 1982 was the only available date as there were no judges available before that date. She indicated that Suffolk was booked up because other counties would not schedule Section 12S hearings.

77. I then called the Middlesex County Clerk's office to schedule an earlier hearing. I spoke with David Barry. He informed me that they were not scheduling any Section 12S hearings but that I could come in and wait for an available Judge. He said that there were no guarantees that the minor would be able to get a hearing at all because the Judges were busy and did not want to hear Section 12S petitions.

78. On Friday, July 30, 1982, I talked to Betty Moore to schedule a

Section 12S hearing for a minor who was eleven weeks pregnant. Mrs. Moore said that Judge Paul Garrity was the judge who was hearing Section 12S petitions during August and that he would not hear any Section 12S petitions where the minor was over eleven weeks pregnant. Mrs. Moore did schedule a hearing for August 5, 1982, but stated that if the minor was over eleven weeks pregnant on August 5, the judge would not be available to hear the petition.

79. I then called the Middlesex County Clerk's Office to try to schedule a hearing. I spoke with William Johnston and he informed me that they were not schedule any Section 12S hearings. He stated that I could come in and wait for an available judge but that there were no guarantees that the minor would be able to get a hearing, even if we were to wait two days in his office.

80. I also called Francis X. Orfanello, executive secretary to Chief Justice James P. Lynch to explain my difficulty in getting a Section 12S petition scheduled. He told me he could do nothing, that I should just bypass the clerk's office and go to the motion session and that I could write a letter to Judge Lynch. I also called Judge Liacos' office and spoke with his secretary.

81. On Monday, August 2, 1982, I informed Mrs. Moore that the minor was now twelve weeks pregnant. Mrs. Moore said that Judge Garrity would not be available to hear the petition.

82. I advised Mrs. Moore that if Judge Garrity would not hear the minor's Section 12S petition merely because she

was twelve weeks pregnant, that I would seek an Appellate Court order requiring him to at least hear the minor's petition.

83. On Wednesday, August 4, 1982, Mrs. Moore called me and stated that Judge Garrity would make an exception and hear my client's Section 12S petition.

SIGNED under the pains and penalties of perjury.
Dated: August 17, 1982

By:/S/ Fredda Hollander
Fredda Hollander

Sworn to before me this
20th day of August, 1982.

/S/ Lynn M. Ciulla
Notary Public
My commission expires: 12/30/87

AFFIDAVIT OF JOAN LENINGTON

I, Joan Lenington, state the following to be true to the best of my knowledge and belief.

I am an attorney admitted to practice law in the Commonwealth of Massachusetts.

On a number of occasions I have represented minors at judicial consent hearings. On September 20, 1982 I appeared in front of Judge Fitzsimmons who was sitting specially in Middlesex Superior Court.

Contrary to my previous experience with consent hearings, the hearing was held in the courtroom rather than the judge's chambers. The judge wore his robe and told the minor to sit at the attorney's table furthest from the bench, specifically directing her not to sit in the witness stand.

Virtually all of the questioning by the judge was irrelevant to the question of the minor's maturity: the judge focused much of his inquiry on the minor's financial situation and how the minor had obtained my services. His tone in questioning me regarding my representation of minors was hostile. More disturbing was his questioning of the minor regarding the morality of her sexual activity and her feelings about having a dead "child". While the minor remained calm and certain of her decision during the inappropriate and inflammatory questioning, she told me afterwards that she was shaken and upset by what appeared to her to be the judge's attack on her.

After about a half hour of questioning the judge informed us he would take the matter under advisement. I spent most of the rest of the day at

the court house waiting for his decision. Because I received the denial of the petition late in the day, I had to wait for the following day to appeal. Judge Fitzsimmons heard my motion for a waiver of costs for the transcript on September 22nd 1983. He again took the matter under advisement despite the fact that waiver of fees and costs in these cases is specifically provided for in Judge Lynch's Standing Order. I again waited for most of the day for a decision and finally received a copy of the transcript only after intervention by a clerk of the Appeals Court.

I would certainly advise other attorneys not to appear in front of Judge Fitzsimmons on a consent case. If I was scheduled to appear before him again on a consent case I would withdraw my petition.

Signed under the pains and penalties of perjury.

DATED: August 9, 1983

/S/ Joan Lenington
Joan Lenington

KEHOE, DOYLE, PLAYTER,
NOVICK & STRIMAITIS
Nine Hamilton Place
Boston, MA 02108
(617) 338-0070

AFFIDAVIT OF MARY MOE'S TEACHER

1. I am a teacher who works at Blue Hills High School, Canton, Massachusetts.

2. Mary Moe, a seventeen (17) year old woman who is one of my students sought my consultation relative to her decision to seek judicial permission for an abortion pursuant to M.G.L. Ch. 112, S. 12S.

3. At that time, and on the occasions that I spoke with my student, otherwise known as Mary Moe No. 82-14871, I was confident that her decision to terminate her pregnancy was based on a mature assessment of her personal and family situation. Moreover, I was convinced that she was not coerced or otherwise being unduly influenced in making this decision.

4. Having discussed the abortion procedure with Ms. Moe, prior to her attending Court, I was confident that Ms. Moe understood the risks inherent in terminating a first trimester abortion and was competent to give informed consent to such procedure. I was also advised at this time that nothing in Ms. Moe's medical history would make such procedure complicated and that any abortion performed would be completely routine.

5. During the week of April 5th through April 9th, 1981, Ms. Moe consulted with me several times relative to the manner in which her petition was being handled by the Superior Court Department of Phymouth County. She contacted me to discuss the fact that she was asked to return to the Court on more than one occasion for further questioning

relative to her decision to terminate her pregnancy. She also informed me that she was instructed to call the Court from day to day until such decision would be rendered. A decision was not finally rendered until the afternoon of April 10, 1981.

6. Having consulted with Ms. Moe throughout the week of April 5, 1981 through April 10, 1981, it was apparent to me that the manner in which Ms. Moe was treated by the Court caused her to suffer great emotional upset. Ms. Moe was forced to cancel her scheduled abortion despite the fact that she was on the borderline of her first trimester of pregnancy. Moreover, she expressed concern over the fact that the Court contacted her at ther parent's home thus violating her confidentiality. Finally, she felt that the manner and the scope of the Judge's questioning was an attempt to discriminate against her and to harass her relative to her decision to terminate her pregnancy.

7. In my opinion, Ms. Moe is a completely mature seventeen (17) year old woman who does not present any emotional or health problem. The innate difficulty of making a decision to undergo abortion in this case was dramatically intensified by the fact that the Court delayed in making its decision and refused to respect the sensitivity of the issues involved.
penalties of perjury this 22nd day of April, 1982.

/S/ Mary Moe's Teacher
Mary Moe's Teacher

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS. DATE: April 22, 1982

Then personally appeared the above-named MARY MOE'S TEACHER and acknowleged the foregoing instrument to be her free act and deed, before me.

/S/ Beryl Ann Cowan
Notary Public
My commission expires:

AFFIDAVIT OF BETTY L. NORDWIND

I, Betty L. Nordwind of 19 County Road, Mattapoisett, Mass. do hereby depose and state the following under oath:

I am an attorney in good standing and licensed to practice law in the Commonwealth of Massachusetts since June, 1981. I am also licensed to practice law and in good standing before the Supreme Court of Colorado, having been admitted to practice in said jurisdiction in October, 1971. I am a member of the joint Womens Bar Association - Planned Parenthood Panel of attorneys, which panel provides legal assistance to minor women seeking judicial consent for abortions pursuant to M.G.L. Chapter 112, Section 12S. During the two year period of time in which I have participated on the panel, I have appeared before Massachusetts Superior Court judges in Bristol and Barnstable counties. I have represented a total of five (5) individual minor clients ranging in ages from 14 to 17 years, before Judges Jacobs, Sheehan and Byron. One of my cases originally denied by Judge Byron was successfully appeared to the Appeals Court of Massachusetts.

In two of my cases heard by Judge Byron, I interviewed and advised the minor indigent petitioners prior to hearing. I assisted in securing their hearings and accompanied the petitioners to Court. Despite this, I was initially barred entry into the Judge's lobby by the bailiff acting on instructions from the Judge. Both of my clients advised me that the Court questioned them about their need for, and prior contact with,

counsel. In the first case, the transcript reflected questioning which led the unsuspecting petitioner to agree with the Judge that she had her own attorney and did not need the Court to appoint and pay for one. My subsequent request for fees was therefore denied. Secondly, and more importantly, the questions posed by the Court were of a nature and asked in a manner that in both instances my clients were reduced to tears during or immediately following the hearings. It should be noted that in both cases, the Judge asked, among other things, whether the petitioners considered the fetus viable. He also asked them to explain the biological process by which conception occurs. In the first case, the Court grilled the client extensively about alternate means to abortion such as relinquishment, adoption and living on public assistance to support the child. As I recall, the Judge said: "Do you realize that a lot of babies are brought up with payments from the government...have you considered that you would be able to get welfare payments for the baby?...and have you considered that a lot of people are brought up that way and live a successful life?"

In my second case before Judge Byron, he became enraged at me for objecting to a similar line of questioning. He whereupon stopped the hearing and asked my client and me to leave his chambers. Approximately 10 minutes later, he called me back and told me that he would not hear the case and that I had to find another judge. The matter was heard de novo before another judge in another

court the following day. Based upon these two judicial encounters and the reaction of my clients thereto, I will not schedule any further M.G.L. Chapter 112 Section 12S hearings before Judge Byron. It should be noted that in both of these cases, Judge Byron was the only judge willing to hear the cases, due to the unavailability of several other Bristol County Superior Courts who refuse to hear these cases and "recuse" themselves. It has been my experience that a minimum of 4 to 5 calls to various courts and clerks in Bristol County must be made to secure a judge willing to schedule a hearing within 24 to 36 hours. For example, in my first hearing before Judge Byron, I and previously been advised by the clerks that Judges Mulligan and McDaniel would not, as a matter of policy, hear my case.

In one of my two hearings before Judge Sheehan, my client was told never to come back again, since this was her request for a second abortion. In another case before this Court, I asked the Judge on behalf of my client for permission to allow her male companion to attend the hearing. The Court indicated to me and to my client that not only would this be denied, but that with any further provocation he would see that her male friend was charged with statutory rape. This statement reduced my client to tears. It should also be noted that in this case while I made arrangements for the hearing with the clerk, the stenographer and/or bailiff discussed the case and mentioned the word "abortion". At this point, the young son of the stenographer who was in the courtroom

asked his father to define the meaning of abortion. I then had to ask the stenographer and bailiff to refrain from using this terminology in public. I personally found this particular episode humiliating and degrading. Fortunately, my client was not present and was thus shielded from the experience.

Time and space limit description of further episodes indicating the difficulty in application of this law. Based upon my direct legal experience in 5 cases in Bristol and Barnstable Counties and tangential involvement in approximately 3 to 4 others, I have drawn the following conclusions:

a. There is extreme difficulty in securing judges who will hear Chapter 112 Section 12S cases.

b. Obstacles exist throughout the conduct of the cases, including the timely scheduling of hearings, the priority these cases should be, but in fact are not, assigned and the appointment of paid counsel. Much of this is dependent on the receptiveness, the sensitivity and interest of the court personnel involved.

c. There is no uniformity in the manner in which the Superior Court judges hear and conduct these cases. In one court, hearings are abbreviated, terse and are completed in 10 minutes; in others, the hearings are gruelling, and last between 45 - 75 minutes. Judicial questioning is sometimes intimate and at other times cursory. In all my cases, the Superior Court judges have told me they dislike having to decide these matters and would prefer not to be vested with the authority to do so.

In my twelve years as an attorney, I have never experienced the difficulties in administering and applying any statute as I have with Chapter 112 Section 12S. In each case, I am struck by the significant degree to which the Superior Court judges feelings and opinions based upon factors such as age, generation, mores, sex, religion and parenthood affect their attitude towards, and disposition of, these cases.

Signed this 5th day of August 1983 at Mattapoisett, MA.

/s/ Betty L. Nordwind
Betty L. Nordwind
Attorney at Law

AFFIDAVIT OF JANET E. PERRY

I am an attorney licensed to practice in the Commonwealth of Massachusetts. As a member of the referral panel established by the Women's Bar Association and National Lawyer's Guild Women's Committee, I have provided legal services to approximately ten (10) minors pursuant to M.G.L. Ch. 112, Sec. 12S.

I represented Mary Moe, Docket No. CA82-14984, before the Honorable Judge Rudolph Pierce on April 28, 1982, in Plymouth County Superior Court at Brockton, Massachusetts.

I had met with Ms. Moe for approximately one hour on Wednesday, April 28, 1982, and had also had telephone conferences with Ms. Moe on both April 27, and April 28, 1982, totalling approximately three-quarters hour. At Ms. Moe's request, both the office conference and the hearing were attended by her mother. At all times, this woman contributed her emotional support and concern for the welfare of Ms. Moe and evidenced a strong feeling of trust for Ms. Moe and for Ms. Moe's decision to bring her petition pursuant to Ch. 112, Sec. 12S.

Before going to Court, I questioned my client as to her decision to seek the Court's permission to seek an abortion, discussing with her her awareness of alternatives, of the medical procedure required in a second trimester abortion and the risks inherent thereto as well as her education, work experience procedure required in a second trimester abortion and the risks inherent thereto as well as her education, work experience and future plans for herself. We also discussed at

some length her decision not to seek the consent, in this particular case, of her father. Ms. Moe was articulate as to all matters discussed and demonstrated a clear understanding and maturity as well as a sensitivity to other individuals from whom she had sought counsel and who were otherwise involved in the matter.

Ms. Moe had, in fact, been told by several individuals who counselled her, including her mother, that she had every right to keep the child, but Ms. Moe made her decision based on her independent judgment after numerous consultations.

I was able to discuss Ms. Moe's decision with her over the course of the two and one-half hours which were spent waiting for the hearing and for the Judge's decision. Ms. Moe remained certain of her decision despite the Judge's interruptions of the hearing so that he could consider certain points and the resulting anxiety to Ms. Moe. One such interruption was prompted by the Judge's decision that he could not accept Ms. Moe's testimony as to the fact that she was twenty-one weeks pregnant as she had been informed by the examining nurses and a physician at the medical institutions where she was scheduled to have the procedure the following day. Ms. Moe's mother, who attended the hearing at her daughter's request, had been present during her daughter's physical examination at said medical institution and confirmed the daughter's testimony.

Although the Judge stated that he did not disbelieve Ms. Moe's or her mother's testimony, he himself was unsure how such a determination had been made and felt

that he needed to have such information provided directly by an examining physician or nurse. He suggested that Ms. Moe try to have the examining individual discuss this matter with him, despite my objection that it seemed impractical due to the fact that the client had received such information the prior day and that the examining individual might not be available to speak with the Judge. In fact, this turned out to be true and, although the hospital provided a nurse to discuss Ms. Moe's test results with the Judge, the examining physician was not available to speak with him.

I decided after objecting to assist Ms. Moe in complying with the Judge's wishes in the hopes that this would foreshorten the hearing and prevent Mr. [Sic] Moe's having to petition the Court in another county or, alternatively, to appeal a denial of her petition. Ms. Moe had scheduled a medical procedure for the following day, the only time within the next ten days when the hospital had time available for this medical procedure.

Both Ms. Moe and her mother became extremely anxious during the waiting periods and Ms. Moe was extremely troubled and withdrawn following the Judge's reluctance to accept her testimony.

Signed under the pains and penalties of perjury this 5th day of May, 1982.

/S/ Janet E. Perry
Janet E. Perry
27 Belmont Street
Brockton, MA 02401
(617) 588-6900

COMMONWEALTH OF MASSACHUSETTS

Plymouth, ss. May 5, 1982

Then personally appeared before me the above signed, Janet E. Perry, acknowledged the foregoing to be her free act and deed, before me,

/S/Cynthia J. Stone
Notary Public
My Commission Expires: 3/18/89

AFFIDAVIT OF JAMIE ANN SABINO

I, Jamie Ann Sabino, do hereby depose and say:

1. I am an attorney admitted to practice before the Massachusetts Bar.

2. I am a member of the Referral Panel that provides representation to minors petitioning the Superior Courts under M.G.L. Ch. 112, § 12S.

3. On Tuesday, May 10, 1983, I undertook, to represent a minor who wished to proceed under said statute.

4. On May 10, 1983, I called the Suffolk Superior Court to schedule an appointment but was unable to schedule one until almost a week later. I then called the Middlesex Superior Court and was able to schedule an appointment for Thursday, May 12, 1983 at 9:30 A.M.

5. On Thursday, May 12, 1983, I arrived with my client at the clerk's office at 9:15 A.M. I was informed that the judge who was going to hear the matter had left and that the only judge available to hear 12S petitions was the motion session judge, Paul Garrity, who would not hear any petition of a minor whose pregnancy was beyond the first trimester.

6. My client was then approximately 14 weeks pregnant and therefore unable to have a hearing before Judge Garrity. I was told by the clerk, William Johnston, that there would not be a judge available on Friday either and I would have to come back Monday or try Suffolk.

7. I again called Suffolk, and discovered I could not obtain a hearing until sometime in the middle of the next week.

8. I explained to the clerk, William Johnston, that my client, who was seventeen and a half, had a small child and no family at all in the area, that it would be extremely difficult for her to arrange for babysitting for another court date as she also had to arrange for a sitter for the hospital procedures, and that she had been brought to the court and was accompanied that day by an adult friend who had taken the day off from work to do so. This adult was also planning to take time off from work to take my client and be with her during the procedure. It would be impossible for the woman to take yet another day from work.

9. Because of these circumstances and because I knew that there were four or five other judges sitting in Middlesex who would hear the petitions, I requested the clerk to check to see if there was another judge who might be willing to hear the petition during a mid-morning recess.

10. Mr. Johnston refused to do so saying the judges were all busy with big important cases.

11. I requested that he ask Judge Garrity to consider hearing this one second trimester case because of the circumstances. He refused to make that request.

12. I informed the clerk that I would personally make the request of Garrity and went with my client to sit in the motion session to wait for a recess.

13. When there was no recess for 30 minutes I contacted the courtroom clerk by phone to make my request. He informed me that Johnston had called to tell him

that a petitioner in her second trimester was coming up to the courtroom with her attorney. Judge Garrity stated he would not hear the petition and would not allow me to even speak to him to explain the circumstances. When I requested of the courtroom clerk the opportunity to speak to the Judge for one minute I was told the Judge had told the clerk to tell me and my client to get out of his courtroom.

14. I again requested William Johnson to try the other judges to see if one would hear the petition during a recess. He refused to try.

15. I informed Mr. Johnston that I would try the other judges personally. Johnston refused to give me the papers in the case until I had a judge who agreed to hear the petition.

16. I went to various courtrooms and finally was able to speak to Judge Porada during a recess between closing arguments and instructions during a trial she was presiding over. She agreed to hear the petition immediately but could not because I had to run to the clerk's office for the papers. When I returned she had begun instructing the jury and we had to wait 45 minutes outside of the courtroom.

17. Judge Porada then heard the petition during her lunch hour. The hearing was completed, the minor found mature and the order signed.

18. My client and I were at the courthouse from 9:15 A.M. until 2:15 P.M.

19. During this time my client was very nervous and agitated as to whether she would get a hearing, whether she would have to wait several days (thus

putting off the abortion until even later in her term), whether she would get another sitter and whether everything was alright at home that day as she had told the sitter that she should be home by noon as the hearing was scheduled for 9:30 (having no phone she was unable to call the sitter). She could not understand why she could not get a hearing as she knew she was entitled to one.

20. There was no reason why William Johnston could not have attempted to find another judge. In past hearings Johnston has attempted to dissuade me from bringing in clients for hearings and has been very uncooperative.

21. If another attorney who did not know which judge would hear these matters had been representing my client she might not have been able to have her hearing.

Signed under the pains and penalties of perjury.

_____

Jamie Ann Sabino
402 Washington Street
Wellesley, Massachusetts 02181

AFFIDAVIT OF SONDRA LONG SHICK

I, Sondra Long Shick, do on oath depose and say:

84. I am giving this statement to reflect my experience representing minors on petitions brought pursuant to Mass. Gen. Laws, Ch. 112, § 12S, from September 1, 1981 to the present. The Affidavit reflects my general experience in the Suffolk, Norfolk and Middlesex Superior Courts and a specific experience which occurred in march 1983, when I appeared before Probate Court Judge Fitzsimmons sitting in the Suffolk Superior Court.

85. Most of my experience has been in Middlesex, where there was a attempt to schedule hearings at 11:00 A.M. and 2:00 P.M. only. Sometimes, it has been difficult to get a hearing.

86. I was informed that most of the Judges refuse to hear the abortion petitions. When I first learned that many members of the Court refuse to hear the petitions, I was shocked. I would have pressed the matter before the Chief Justice, had I not believed that antagonizing the Judiciary might make the situation worse for the minors who are usually having their first experience with the court system.

87. I have found the Judges to be uninformed as to the standard to be imposed, namely and inquiry as to maturity, and, not finding same, an inquiry into best interests. I have heard many inappropriate questions asked as to whether the father of the child approves, or whether the parties knew what they were getting themselves into.

88. I have observed that most of the young women have come with the father of

the child, and that most of the pregnancies arise out of a long-term relationship.

89. I have also observed that most of the minors indicate that they are unwilling to tell their parents, because they believe their parents will insist that they have the baby.

90. I have also observed a few cases where minors have complained of potential physical violence from their parents.

91. In March 1983, I had a specific experience with Judge Fitzsimmons which caused me to seriously consider filing a complaint with the Judicial Conduct Commission.

92. I appeared in Court with a minor, completed the appropriate forms and was led to Judge Fitzsimmons Courtroom. The minor had had a troubled childhood. I was prepared to argue that an abortion would be in the interest of the minor because of the troubled childhood.

93. Instead of making an inquiry in his Lobby, the Judge held an open session in Court. I was not aware of anyone being informed that the Courtroom was closed.

94. The first inquiry that was made by the Court was as to whether I should be appointed counsel. The Court seemed unaware that the statute specifically provides that an attorney shall be appointed to represent the minor. Nevertheless, the Court continued an inquiry as to the financial resources of the minor. I can only analogize the inquiry to that made of a spouse who is the subject of a hearing for contempt for nonsupport.

95. The next inquiry by the Court of the minor was how she knew she was pregnant. The Court displayed an amazing amount of lack of knowledge of the reproductive and pregnancy diagnosis process.

96. Since I am the parent of three children, I ultimately explained to the Court that a urine test along with information as to the last menstrual period was an accurate and scientific method of determining the number of weeks of pregnancy.

97. Nowhere was an inquiry made as to maturity, nor was an inquiry made as to best interests.

98. Two days later I called the Court, and was informed that Judge Fitzsimmons had denied the petition, and had denied my appointment. I called the stenographer, and asked her to please type a transcript as soon as possible, as I would be appealing to the Appeals Court.

99. The next day the stenographer informed that Judge Fitzsimmons would not allow her out of the Courtroom to type the transcript, indicating that there was no urgency.

100. The stenographer informed me that she would stay into the evening, and type the transcript in order to assist an immediate appeal. This she did, and upon receiving the transcript, I went immediately to the Appeals Court, where the Judge was reversed, and sufficient evidence of maturity was found based on the minor's ability to handle the questions regarding financial matters. (44_ NE2d ____, 1983).

101. If the Court would like any additional information, I would be happy to testify further on behalf on the minors bringing petitions pursuant to Mass. Gen. Laws, ch. 112, ¶12S.

SIGNED under the pains and penalties of perjury.
Dated August 23, 1983

By: /S/ Sondra Long Shick
SONDRA LONG SHICK
Affiant

Middlesex, ss. August 23, 1983

Then personally appeared the aforenamed Sondra Long Shick, to me well known, and made to the truth of the

foregoing three pages of the Affidavit, Items 1 through 18.

Before me,

[Signature illegible
Notary Public
My Commission Expires:
3/14/86

AFFIDAVIT OF NANCY E. SPENCE

I, Nancy E. Spence, of Cambridge, Middlesex County, Massachusetts, having been duly sworn, depose and say as follows:

1. On Wednesday, July 21, 1982, I was asked to represent a 16 year old woman who sought judicial approval for an abortion pursuant to G.L.C. 112 § 125 [sic].

2. The minor had scheduled an appointment for a D & E procedure at Boston City Hospital on Monday, July 26, 1982. The minor was in her fourteenth week of pregnancy.

3. On July 21, 1982, I called the Clerk's Office at Suffolk Superior Court and was told that there were no appointments available at any time on Wednesday, Thursday or Friday, July 21st,

22nd and 23rd. I also called Middlesex and was told that I could not make an appointment; the minor and I would have to come to the courthouse and wait indefinitely if we wanted to be heard. I then called Norfolk, and an appointment was scheduled for the next day, July 22nd.

4. Travelling to Norfolk presented a problem, since neither the minor nor I own a car. I was forced to borrow a car in order to transport the minor and myself to Dedham to keep the appoinment.

/s/ Nancy E. Spence
Nancy E. Spence

THE COMMONWEALTH OF MASSACHUSETTS
Suffolk, ss. August 3, 1983

Subscribed and sworn to, before me,

/s/ Shirley B. Coleman
Notary Public
My commission expires:
February 21, 1986

AFFIDAVIT OF EMILY S. STARR

Emily S. Starr does swear that the following is true to the best of her knowledge and belief:

1. I am an attorney admitted to the Supreme Judicial Court of the Commonwealth of Massachusetts in December, 1974.

2. I practice law primarily in Worcester County and have offices at 435 Main Street, Fitchburg, MA and 339 Main Street, Worcester, MA.

3. On April 15, 1982 I was asked by a 16 1/2 year old woman from Leominster to accompany her to Court to request judicial authorization for an abortion. She believed herself to be 21 weeks pregnant.

4. On Friday, April 16, 1982 at approximately 9:50 a.m. a hearing pursuant to G.L. c. 112 § 12S commenced before Judge Robert V. Mulkern of the Worcester Division of the Superior Court Department of the Commonwealth of Massachusetts.

5. The hearing was suspended approximately ten minutes later to allow Petitioner, named Miss M.M. on the Petition, to obtain a physician's report as to the number of weeks of her pregnancy. The Judge requested that the report be signed under the pains and penalties of perjury if the physician could not be present at the hearing.

6. I attempted to arrange for a physician's examination as soon as possible. (Miss M.M. had had a pelvic examination by a physician at Fitchburg Family Planning but had no report with her.) I telephoned, among others,

Worcester OB-GYN Associates, Inc., Memorial Hospital, University of Massachusetts Medical Center, and Dr. Arthur Stern. Dr. Stern was the only physician able to perform an examination within four hours. Miss M.M. had an appointment on Monday at Hamden County OB-GYN for a physical and ultrasonic examination and for the insertion of laminaria rods to commence the abortion process. As her pregnancy was quite advanced, it was imperative to conclude the G.L. c. 112 § 12S hearing on that day.

7. Dr. Stern examined Miss M.M. and signed an Affidavit under the pains and penalties of perjury that Miss M.M. was 22-23 weeks pregnant.

8. The hearing was reconvened at approximately 3:00 p.m. After reviewing the Affidavit and questioning Miss M.M., Judge Mulkern rendered the following decision appended hereto:

1. The petitioner is mature and is capable of giving informed consent. In a general way she understands the nature of the proceedings.

2. I am not convinced that the petitioner has not reached the third trimester of her pregnancy, which is to say the 24th week thereof.

I have employed because of the finality and import of this decision the standard of proof of "beyond a reasonable doubt".

Were I to employ a lesser standard, or if a lesser standard is to be employed, I would authorize the abortion.

3. Were I to authorize the abortion, I would also order in this case that it be accomplished in accordance with the procedures set forth in Chapter 112, Section 12P and Q, which is to say in a general surgical setting and with an obstetrician in attendance.

I order that the petition for the foregoing reason be denied. It is ordered that the Clerk of the Superior Court make his full facilities available to the petitioner to expedite an appeal in this matter.

9. A notice of appeal was filed immediately and a hearing held within 3 hours. After considering my argument, the Appeals Court issued the following order appended hereto.

We affirm the decision not to authorize an abortion at this time without prejudice to a renewal of the petition if accompanied by the results of an ultrasonic examination and accompanied by evidence of the reliability of such examination. Evidence of reliability may be in the form of a sworn statement contained in a letter of a qualified physician or other expert.

10. Miss M.M. was unable to arrange the request for ultrasonic testing before the following Monday, April 19, 1982. Judge Mulkern was unable to hold a hearing on the renewed petition until early in the morning on Tuesday, April 20, 1982 as April 19, 1982 was a holiday and the Courts were closed.
11. Because the laminaria rods could not be inserted on Monday, April 19, 1982 without consent, and because Miss M.M. could not renew her petition for judicial consent until Tuesday, April 20, 1982, I was informed by Hamden County OB-GYN that Miss M.M. could not be admitted to the hospital for at least a week, until Tuesday, April 27, 1982.
12. Miss M.M., afraid that April 27, 1982 would be too late, travelled over 195 miles to New York City to obtain an abortion on Tuesday, April 20, 1982.

Signed under the pains and penalties of perjury.

Date: April 23, 1982

/s/ Emily S. Starr
Emily S. Starr

AFFIDAVIT OF JEAN S. STRIPINIS

My Name is Jean S. Stripinis, and I am an attorney practicing law at 27 Belmont Street, in Brockton, Massachusetts. I was admitted to the Massachusetts Bar in December, 1980, and have been in practice since January, 1981.

Between May, 1982 and the present, I have represented fifteen minors in petitions under G.L.c. 112, Section 12s in Bristol, Plymouth, and Norfolk Counties. In all cases I have found the court personnel helpful and supportive of the minors in facilitating the hearing and protecting their privacy.

The attitudes of the judges I have encountered in these cases has varied from very sympathetic to very contemptuous. I have been particularly appreciative of the handling of these cases by Judges Jacobs, Fine, Zobel, Abrams and Hurd.

The most frustrating experience I have had in these cases was a recent hearing in which I represented a 16-1/2 year old, who was approximately 10-12 weeks pregnant. I felt that her appearance, demeanor, work experience and age were preliminary indicia of maturity, although she did indicate to me privately that she was not absolutely certain that she wanted to proceed with an abortion. She had not consulted her parents, but was being advised by a number of friends not to proceed with the abortion.

Normally, had I been aware that she was uncertain, I would have advised that she receive further counselling before appearing in Court. But, because of the proximity in time to the end of her first

trimester, I suggested that we proceed with the hearing, so that if she did decide to end the pregnancy, she could keep her clinic appointment, scheduled for two days after the hearing.

The judge seemed to understand the statute and guidelines well, and his explanation of the necessity for the hearing, and its confidentiality were excellent. But in questioning her, he dwelt at what I felt to be inappropriate length upon two factors, first, the reason she had chosen not to consult her parents; and second, how she know how far along her pregnancy was.

I did not object to the questions about consulting her parents; and I felt that her answers (she was one of nine children, her relationship to her parents has been so poor that she had lived away from home for a time, her mother has high blood pressure) were helpful in demonstrating that under the circumstances, her decision not to consult her parents was an indication of maturity. The judge apparently did not agree and pushed her hard, asking: "Don't you feel that your parents might be supportive if you consulted them"?

In answer to his question as to how she knew how far her pregnancy had advanced (she had answered that she was approximately 10-12 weeks along), she answered that she had had a urine test at Bill Baird Clinic which had confirmed her pregnancy, and that she had been told, based on what she had indicated as the date of her last menstrual period, that she was probably 10-12 weeks pregnant.

The judge also questioned her about the abortion procedure she would undergo,

and she read from detailed, accurate notes she had made from her phone conference with Planned Parenthood League counsellors.

He then asked me whether I wanted to question her further. I asked her for more detail about her family, whether she knew the relative safety of abortion vs. pregnancy at her age (she did), and her reason for making detailed notes of the abortion procedures. I thought her answers all tended to establish her maturity. I then asked the judge whether there was any specific area of concern which I might clarify. At this point he paused for a long time and finally answered that he was under the impression that the Bill Baird Clinic had lost its license to perform abortions and that therefore its urine test results might not be accurate. I said that it was my impression that urine tests were merely for the purpose of confirming the pregnancy, that the clinic's estimate of how far along her pregnancy was was based on information she had provided about her last menstrual period.

I also said that she had an appointment for the procedure at Pre-Term Clinic, and it was my impression that they would routinely confirm the length of the pregnancy before performing abortions. He insisted that he wanted to be certain as to which kind of procedure would be used, and that for this he had to be sure how many weeks pregnant she was. I said that I felt that since the pregnancy had obviously not gone beyond the second trimester, even though it might possibly have gone beyond the first, that the decision as to which

procedure would be used was a medical decision; that Pre-Term was a reputable clinic and could be relied upon to make an accurate determination; that if he found the client to be mature then the medical decision should be hers, in consultation with the clinic.

At this point he said that he did not find her to be mature, and thus was making a best interest determination, and thus he felt he had to know exactly what procedure he was authorizing. He said he intended to continue the hearing to permit us to do one of two things; either to produce a certificate of D.P.H. showing that the Bill Baird Clinic was authorized to perform urine tests; or to have a test done at Pre-Term to determine the length of the pregnancy and to notify him of the results. He said that alternatively he would deny the petition and we could appeal his decision to the Appeals Court. I tried to convince him instead to tailor an order authorizing the client to consent to an abortion upon the condition that a test was performed prior to the abortion. I pointed out that the client had no transportation of her own; that she had limited funds and time (she worked every day) and that requiring her to go to the clinic and then return to court for an order was a significant hardship.

In consulting with the client after the hearing was suspended, she said she would prefer to go for a sizing to Pre-Term that evening and to come back to Court the next day. I waited to hear from her all morning on the following day; finally I went to the Courthouse and was told that my client had called in

tears and asked to withdraw her petition.

I called her later to confirm that this was her decision. Because of other factors, I am not sure what her decision in regard to the abortion would have been and the hearing gone differently. But, because of my experience in this case I would certainly never bring another petition before this particular judge, and I have advised the Lawyer Referral Panel of my experience.

Signed under the pains and penalties of perjury this 17th day of August, 1983.

/S/ Jean S. Stripinis

Jean S. Stripinis
27 Belmont Street
Brockton, MA 02401
(617) 588-6900

AFFIDAVIT OF LYNN WHITNEY #1

I, Lynn Whitney, due [sic] depose and say the following:

1. I am an attorney admitted to practice in the Commonwealth of Massachusetts and I maintain an office at 81 Hawthorn Street in New Bedford.

2. I participate in the WBA/NLG Referral Panel for minors regarding MARY MOE petitions.

3. I made arrangements with the Bristol Superior Court in Taunton to see a Judge at 9:30 A.M. on October 25, 1985 on a MARY MOE Petition.

4. My client and I arrived at the Court at approximately 9:30, informed the Clerk of this, and waited for the Judge to arrive; waiting in the Clerk's Office.

5. At approximately 10:15 I inquired as to wnether the Judge had arrived and when he was going to see us.

6. A woman in the Clerk's Office checked on the matter and determined that the Judge had gone into the motion session and we were advised to go up to the court room and wait in the motion session for the Judge to break to hear us.

7. This we did and we waited in the motion session from approximately 10:30 until 12:00 when the motion session was completed and the Judge recessed.

8. After taking a ten minute break, the Judge heard us in Chambers for a five minute hearing.

9. I billed for my time which was in total 3 3/4 hours at $25.00 per hour and 1/4 hour at $35.00 per hour for a total of $93.75. The Judge reduced that amount to $50.00.

Signed under the pains and penalty of perjury, this 29th day of November 1985.

/s/ Lynn Whitney
Lynn Whitney

AFFIDAVIT OF LYNN WHITNEY #2

I, Lynn Whitney, do hereby depose and say:

102. I am an attorney, admitted to practice in the Commonwealth of Massachusetts. I maintain a law office at 115 Orchard Street, New Bedford, Massachusetts 02740, (617)992-2271.

103. I am a participating attorney on the Women's Bar Association and National Lawyers Guild Panel representing minors in proceedings pursuant to M.G.L.c. 112 § 12S, I am also a member of the National Lawyers Guild.

104. I have represented several minors seeking judicial consent for the abortion procedure in Bristol County.

105. I have experienced difficulties both in scheduling convenient hearings for the minors and in the conduct of hearings as set forth below.

106. In Bristol County, which covers New Bedford, Fall River and Taunton areas, the civil session of the Superior Court sits in Taunton. A minor seeking judicial consent for an abortion must go to the Taunton Court to see a judge. There is no public transportation between New Bedford and Taunton. The only exception to this was July, 1983 when, for the first time in 3 years, the civi session sat in New Bedford for one month.

107. On one occasion in April, 1983 when I was referred to a minor the only judge available in Bristol County was Judge Chris Byron who was sitting in Fall River. I was aware through other panel attorneys that he intimidated minors by, for example, refusing to appoint

attorneys if the minor's boyfriend (father) had a job, and by requiring the minor to consider that she was killing a life.

Due to lack of choice, I arranged an appointment in Chambers with Judge Byron, having previously arranged for a Spanish interpreter for the minor and having conferred with her at my office.

At the hearing Judge Byron wanted only the minor and the interpreter in Chambers, excluding me. I went into Chambers and protested my exclusion. Judge Byron demanded that if I were not representing the minor not to leave. I explained that I had conferred with the minor and wished to be appointed by the Court. He stated that he had not appointed me and if I did not represent her to leave. I refused to leave so on the record he stated that I represented her.

After I examined the minor through the interpreter, Judge Byron asked her questions about when she came to the U.S. from Puerto Rico, did she learn English in Puerto Rico, who did she come to the U.S. with (male or female), where did she live when she came here, did she understand how children were conceived and would she describe how a woman becomes pregnant. Judge Byron also included her name and address on the record.

I objected to many of the above questions and we had heated arguments particularly about the name on the record and the question regarding the conception process. After her answer to the latter question, he said he would find her mature based on this question.

When I requested the written authorization after the hearing, Judge Byron stated he had to make written findings and could not say when he would have the decision ready. We argued about the availability and adequacy of the boilerplate form, but he was insistent to make his own findings. After calling and stopping by the Fall River Superior Court twice (Fall River is 15 miles from New Bedford) I obtained the judicial authorization. I was at the same time informed by the Clerk I would not be paid since I was not appointed by Judge Byron but that the interpreter could submit a invoice for payment.

The foregoing statements are true and accurate to the best of my knowledge.

/S/ Lynn Whitney
Lynn Whitney
115 Orchard Street
New Bedford, MA 02740
(617)992-2271

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss. August 9, 1983

Then personally appeared the above named Lynn Whitney and acknowledged the foregoing instrument to be her free act and deed, before me

/S/ Linda L. Southworth
Notary Public
My Commission Expires: 10/20/89

[W.B.A./N.L.G. Lawyer
Referral Panel Letterhead]

March 26, 1982

Hon. James P. Lynch, Jr.
Chief Justice
Superior Court Department
Trial Court of Massachusetts
1112 New Courthouse
Boston, MA 02108

RE: G.L. c. 112, § 12S

Dear Chief Justice Lynch:

I am writing on behalf of the members of the Women's Bar Association and the Women's Committee of the National Lawyers Guild who participate in and operate the lawyer referral service for minors seeking legal representation in proceedings brought under G.L. c. 112, § 12S. My purpose in writing is to bring to your attention a number of problems that have arisen in the implementation of § 12S and need resolution.

1. Scheduling of § 12S hearings: It appears that there are some counties of the Commonwealth where it has been impossible to obtain a hearing on a § 12S petition because the Superior Court judges assigned to that county are unable or unwilling to hear such cases. In the past six months, we understand that this

problem of no available judges has occurred a number of times in Essex County, in Salem. Because the judges assigned to Salem sessions have not been available, § 12S petitioners have been required to travel to Peabody, Newburyport, or Boston in order to have their petitions heard.

A similar problem has arisen in Plymouth County. In the Superior Court located in Brockton, the clerk insists that § 12S petitioners must go to where a civil motion judge is sitting. It often happens that the only civil motion judge assigned to Plymouth County is sitting in Plymouth itself. Accordingly, minors who would ordinarily go to the Brockton court must travel to Plymough in order to have their petitions heard. In addition, on several occasions, the motion judge sitting in Plymouth County has declined to hear the § 12S petitions. The result has been that no judge of the Superior Court Department in Plymouth County has been available to hear the petitions, and the minors have had to travel to another county in order to obtain hearing.

In Suffolk County, while there has always been at least one judge willing or able to hear § 12S petitions, in a number of months the civil assignment judge to whom these cases are originally sent has insisted that the § 12S petitioners may be heard only on certain days of the week and at certain times of those days.

These limitations on the availability of a forum in the Superior Court to hear § 12S petitions runs counter to the

provisions of G.L. c. 112, § 12S, as well as to the Court's (Amended) Standing Order No. 12-80. It also contravenes the spirit of the suggested guidelines issued by Justice Liacos of the Supreme Judicial Court, which are appended to the Standing Order. Minors seeking a hearing on a § 12S petition should be able to have that hearing in the nearest available Superior Court. Under the Standing Order, the only exception to this rule is the situation which occurs when no session at all is held in a particular county. We request that you take whatever steps are necessary to rectify these scheduling difficulties, so that these minors will receive decisions "promptly and without delay so as to serve [their] best interests." G.L. c. 112, § 12S.

2. Proof of Indigency: In a few § 12S cases, the judge has inquired of the minor about her financial situation presumably to establish indigency before allowing the minor's attorney to submit a voucher for payment for legal services. Again, we believe that G.L. c. 112, § 12S, and Standing Order No. 12-80 make clear that the Commonwealth is to provide for (and thereby compensate) legal counsel for the minor if she requests an attorney. See Standing Order No. 12-80, ¶ (2).

3. Confidentiality of § 12S Proceedings: In at least one county, Essex, a problem exists with the confidentiality of § 12S proceedings. It appears that the staff of the Clerk's office is a times very indiscreet with respect to the handling of a § 12S case,

announcing the case publicly and in the presence of many witnesses. On a number of occasions, several minors were left all together in one room with their attorneys to wait until their § 12S petitions could be heard. The statute and the Court's Standing Order prohibit these breaches of confidentiality.

4. Conduct of § 12S Hearings: We have received a number of reports of § 12S proceedings where the judges hearing the cases have conducted proceeding in a manner which appears materially to contravene the SJC Guidelines attached to Standing Order No. 12-80. One judge automatically found a 16-year-old minor immature when he learned that she had been pregnant before; he refused to hear any evidence concerning her history as a student, her job experience or her interest in finishing high school and in going on to college. The judge thereafter concluded and told the minor that authorizing the abortion was in the minor's as well as "society's" best interest. In addition, a number of judges continue to ask wholly inappropriate questions of the minor, including inquiries about the religion of the petitioner and whether abortion is prohibited by her religion; about the moral aspects of having an abortion and of premarital sexual relations; about whether the § 12S petitioner intended to marry the putative father; and about the name of the physician who would perform the abortion.

While a judge hearing a § 12S petition has discretion under the statute

to conduct the hearing and to ask questions which he or she thinks will assist in assessing the maturity of the petitioner and the petitioner's best interests, there are certain bounds beyond which these questions should not go. The types of findings and questions described have crossed those bounds permitted by the statute and by judicial opinions construing it. See Planned Parenthood League of Massachusetts v. Bellotti, SJC No. 81-124 Civil, "Memorandum Under the General Superintendency Power Concerning the Implementation of St. 1980, c. 240, Inserting G.L. c. 112, § 12S," Slip Op. at pp. 5-6, ¶¶ 7 & 8 (1981); In the Matter of Mary Moe, Mass. App. Ct. Adv. Sh. (1981) 1439.

/S/ Margot Botsford
MARGOT BOTSFORD, ESQ.
Steering Committee

[W.B.A/N.L.G. Lawyer Referral Panel
Letterhead]

December 21, 1982

The Honorable James Lynch, Jr.
Administrative Justice of
the Superior Court
New Court House
Boston, Massachusetts 02108

Dear Judge Lynch:

We are writing to you on behalf of the members of the Women's Bar Association/National Lawyer's Guild Referral Panel. The Referral Panel includes approximately two hundred attorneys who represent young women in G.L. c. 112 §12S proceedings before the Superior Court. In the year and a half that the law has been in effect, the personnel of the Superior Court in an effort to streamline the process by which young women obtain representation and appear before the Court for the purpose of obtaining consent to abortion.

The Panel Board has found the clerks' offices to be extremely helpful in assisting attorneys and their clients in obtaining hearings as expeditiously as possible. However, during the month of August, several members of our panel encountered serious difficulties in obtaining speedy hearing dates for their clients. In some instances, young women were forced to wait as long as a week and a half between the initial request for a

hearing and the actual hearing date. Such delays were extremely emotionally trying for the ycung women involved, adding an additional element of stress to already difficult situations. More importantly, a delay of the performance of an abortion might have easily resulted in serious health consequences if that delay necessitated the performance of a second rather than first trimester abortion. In addition, these delays were in contradiction to the spirit of the guidelines established in Planned Parenthood League of Massachusetts v. Bellotti which suggest that "petitions should be heard as expeditiously as possible . . . and on the same day if practical."

These delays, which were in no way the fault of the clerks in the various courts, appear to have been caused by a combination of factors. Several judges have recused themselves from hearing 12S petitions, sharply reducing the number of judges available at any given time to hear these matters. Added to this constant reduction in number of available judges, many judges were temporarily unavailable in August as a result of vacation schedules. While the shortage was not created by any lack of diligence on the court's part, the fact remained that the processing of 12S petitions in August was exceptionally difficult.

We are writing to you at this time because we are concerned that similar shortages of judicial resources may occur around the Christmas and February school holidays. We would suggest that the

following steps may alleviate potential problems caused by a shortage of judges.

1) In drawing up judicial appointment lists for sessions, it is essential that at least one judge who is willing to hear c. 112 §12 petitions is assigned to each county. In the more populous counties, such as Suffolk or Middlesex, more than one judge must be available at any time.

2) Judges should be advised by memorandum that a shortage of judicial resources may occur from time to time as a result of some judges having recused themselves. The memorandum should advise judges that at certain times they may be required to hear 12S petitions quite frequently due to this shortage.

3) The possibility of assignment of judges from other courts, particularly the District or Probate Courts, should be explored with Chief Justice Mason's office.

The Panel Board is very interested in working with the Court to identify other possible solutions to such temporary shortages in advance, thereby avoiding a recurrence of this problem. Members of the Board would be happy to cooperate with the Administrative Office of the Court in any manner which seems

productive in seeking a reasonable resolution to these unfortunate delays. A fuller discussion of this situation by members of the Panel, staff of the Administrative Offices, and representatives of several clerks' offices may well be an appropriate way to generate other ideas for resolving this problem.

If the Referral Panel Board can provide any further information which may be useful, please do not hesitate to contact us. We can be reached by mail or by phone at the following numbers.

Norah Wylie 451-1380
Jamie Sabino 237-7602

Thank you in advance for your attention to this matter. We look forward to hearing from you regarding this matter.

Respectfully,

/S/ Norah M. Wyllie

Norah M. Wylie

/S/ Jamie Sabino

Jamie Sabino

Co-Chairpersons,
WBA/NLG Referral Panel

[Harrison & Harrison, P.C.
Attorneys At Law
Letterhead; carbon copy]

July 13, 1983

The Honorable Samuel Flaksman
Essex County Superior Court
Peabody Courthouse
Peabody Square
Peabody, MA 01960

Re: In the Matter of Mary Moe;
Correspondence of Jamie Ann Sabino to Chief Justice James P. Lynch concerning G.L. c. 112, sec. 12S

Dear Judge Flaksman:

I am writing in response to your telephone call of July 12 concerning the above matter in order to further explain the events which precipitated Attorney Sabino's letter to Chief Justice Lynch.

On Thursday, July 7, 1983, I telephoned the Office of the Clerk of the Essex Superior Court to arrange a hearing on a petition which I was intending to file for a sixteen year old Danvers woman who was pregnant and was seeking judicial approval for an abortion pursuant to G.L. c. 112, sec. 12S. I was directed by Assistant Clerk Mary Sullivan to contact John Rafferty, an administrative assistant to the Clerk, who is the person currently responsible for scheduling

hearings on these petitions in Essex County. After speaking with Mr. Rafferty, he advised me that Judge Brady, the motion session judge for Essex County, would not hear 12S petitions as he is opposed to abortion on moral grounds, but that you would hear the matter. Mr. Rafferty said he would call me back after speaking with you and arrange a convenient time for the petition to be heard.

Mr. Rafferty contacted me again by telephone during the afternoon of July 7 and informed me that he had spoken with you regarding this matter and that you would not hear the petition until the Petitioner had obtained "an affidavit or something in writing from a physician stating that she was pregnant and the length of the pregnancy at the time of the pregnancy test." Mr. Rafferty also stated to me that you would also require "an affidavit or a signed statement" from the Petitioner stating that she had consulted an abortion counsellor and her attorney concerning the abortion, that the procedure and risks of the abortion procedure had been explained to her, and that she understood the procedure and the risks. Furthermore, Mr. Rafferty stated that the affidavit of the Petitioner should state that she was electing to have the procedure performed in light of any risks and of her own free will. Additionally, Mr. Rafferty stated that he thought that you might require proof of a "blood test."

Mr. Rafferty continued our conversation by explaining that you were refusing

to hear 12S petitions without the aforementioned affidavits because of a fear that a Petitioner might "change her mind or have second thoughts" a few months after the abortion was performed and that you might somehow be held responsible. Mr. Rafferty concluded the conversation by stating that "as soon as you have the documents, Judge Flaksman will be happy to hear the matter." I advised Mr. Rafferty that the affidavit requirements exceeded any requirement imposed by the statute, but he stated that I would have to obtain them if I wanted the matter to be heard by you.

After my conversation with Mr. Rafferty, I spoke with Attorney Sabino of the Woman's Bar Association Referral Panel on 12S Petitions, inasmuch as I felt that the affidavit requirements referred to by Mr. Rafferty were not mandated by the statute, and as a practical matter were excessively burdensome to my client. Ms. Sabino suggested that I have the matter heard in another county, and in fact the petition was subsequently filed, heard, and allowed in Suffolk County on July 11.

I offer the foregoing account from my own recollection and from my notes of telephone conversations on July 7. I must say that my recollection of these events is quite vivid, not only because they transpired less than a week ago, but because I was quite surprised to learn of the affidavit requirements reportedly being imposed by you. In May 1983, I brought a similar 12S petition before you and no such affidavits were required.

I have contacted Attorney Sabino pursuant to the request which you made during our telephone conversation and have advised her of your representation that it is not your practice to require the affidavits as a condition for a hearing on a 12S petition.

I regret any misunderstanding that may have occurred. However, the statements set forth in this letter accurately reflect my conversations with Mr. Rafferty.

If I may do anything further to clarify this situation, please do not hesitate to contact me.

Very truly yours,

HARRISON & HARRISON, P.C.

By: Howard P. Blatchford, Jr.

HPB/be
cc: Jamie Ann Sabino, Esq.

SOME JUDGES SHUN TEEN ABORTION CASES

Teenage abortion cases are routinely being refused or avoided by a group of Superior Court judges because of their personal opposition to termination of pregnancy.

About a dozen judges in the Superior Court system, about one in six, are steering clear of cases in which teenagers ask the court for permission to have abortions without parental consent.

Although the practice is not widespread, the refusal by some judges to take the so-called "Mary Moe" cases has caused some friction within their ranks and created obstacles for some teenagers in seeking timely permission for an abortion.

The judges' reasons for declining teen abortion cases center on their personal and religious beliefs. In addition, some express concern about intruding on what they view as a family decision. Others feel it is better to leave the cases to judges who might hold less of an anti-abortion bias.

Judges have the right to refuse cases because of personal biases or beliefs. But some pro-choice advocates, lawyers and fellow judges complain that the practice overburdens the systems and in some cases, causes severe problems for the pregnant teenagers seeking court permission for abortions.

Based on interviews with judges, lawyers and pro-choice advocates, abortion is the only area of the law in which judges regularly disqualify themselves from cases on principle. In most other instances, present and former members of the bench say, a judge will refuse to hear a case only if he or she has some financial, familial or other personal connection with the parties in the case.

Judge William H. Carey, who often sits in Brockton and Dedham, is one of the judges who absolutely refuses to hear teen abortion cases. He said it is the only subject on which he would decline to take a case. "I don't think there's any other group of cases that I feel so strongly about that my impartiality would be in question," said Carey.

Carey, a Catholic, said his position stems not so much from his religious beliefs as from a basic opposition to the concept of abortion. "I'm opposed to the allowance of these petitions," Carey said. "It runs against my emotions and my conscience, ad I simple could not be impartial."

Under the canons of judicial ethics, a judge must withdraw from a case in which he or she cannot make an unbiased decision.

As Carey readily acknowledged, opinions vary sharply on the propriety of refusing to hear teen abortion cases.

"Some judges are just plain uncomfortable about that," said Thomas R. Morse Jr., chief administrative justice of the Superior Court. "They don't want to intrude themselves on the family relationship."

Morse said the court-approved abortion system is "running smoothly" despite instances in which judges refuse to hear cases.

But he recently sent a letter to all 60 Superior Court judges, asking that they make every effort to hear the abortion cases.

Former Superior Court Judge Paul G. Garrity, who said he found it difficult ruling on one teen abortion case, objects to the practice of avoiding these cases.

"A judge should not disqualify himself or herself except in the most extreme cases...where they see very clearly that their decision would be biased," Garrity said. "I mean, you're paid to decide cases."

For Garrity,"extreme" circumstances arose when a teenager came to court beyond her third month of pregnancy. "I just couldn't deal with it. My gut was just too troubled by it," he said. In those instances, Garrity would request that the teenager and her lawyer seek another judge to decide the case.

Superior Court Judge Hiller B. Zobel, who lives in Cohasset, said in a recent interview that the refusal of some judges

to hear Mary Moes increases the workload on other judges in an area of law that is charged with emotion.

At the core of the issue is the parental consent law, which requires a judge to consider whether to grant permission for an abortion to a pregnant teenager who hasn't received parental approval.

The teenager - called Mary Moe in all cases to protect her identity - and her lawyer meet with a judge in private in the judge's chamber.

If a judge decides a teenager is mature enough to make the decision on her own, permission is granted. If the judge decides, as occurs only rarely, that the teenager lacks the maturity to make the decision, the judge must make it for her.

Every year, about 1,000 pregnant teenagers ask the court for permission to have an abortion. In most instances, the teens turn to the court because they don't want to tell their parents. In 98 percent of the cases, they receive court consent.

Most of the teenagers are represented at no charge by the Judicial Consent for Minors, Lawyers Referral Panel, whose attorneys are paid with state funds. Jamie Ann Sabino, co-chairman of the panel, praised Morse for his help with the issue but added there is little he can do about the problem.

But Sabino disagreed with Morse's contention that the system is running smoothly. While no teenager she knows of has ever carried a child to term because she was unable to gain court consent, a judge's refusal to hear a case can sometimes cause financial and emotional hardship, Sabino said.

In outlying areas such as Cape Cod and western Massachusetts, a judge who refuses to hear a case can sometimes leave a pregnant teen no choice but to travel miles to another county courthouse for another hearing. Simple things such as getting time away from work or school become major problems when getting a prompt decision is so crucial, Sabino said.

In almost every case where a judge has refused to allow the abortion, the state Appeals Court has overturned the decision, Sabino said.

Judge B. Joseph Fitzsimmons Jr., who lives in Weymouth, heard five teenage abortion cases between 1982 and 1985. In all five, he ruled that the teenagers were insufficiently mature to decide for themselves to have an abortion and he then denied their requests. All of his denials were overturned on appeal and the abortions were allowed, Sabino said.

Fitzsimmons, through a spokesman, declined to comment on the issue.

Because some judges develop a reputation for opposing abortion or

refusing to hear cases, lawyers and their clients do what is referred to as "judge shopping."

"There are judges who will ask questions: 'Do you think you're killing a child?' 'Don't you know that the fetus has eyes?' 'Why aren't you telling your parents?' 'When did you have sex?'" Sabino said. Such questioning can cause great emotional stress for teenagers already in the midst of a major crisis, she said.

The judges themselves are aware of "shopping". Judge John Ronan, who often sits in Salem, said he has never stated his views on abortion publicly nor turned down a case. But he is on the referral panel's list of judges to avoid.

"I've never said I wouldn't hear them," Ronan said of the abortion cases, but added, "I suspect that there's some shopping and that the shoppers would avoid this market."

Other judges who, according to the referral panel, refuse or are reluctant to hear abortion cases, declined to discuss the issue. Judge James Lynch of Scituate and Judge John Forte declined to be interviewed. A spokesman for Judge James McDaniel said he doesn't give interviews.

Others who have refused to hear abortion cases or have expressed reluctance include Judges J. Roger Champagne and Haskell Freedman, two Family and Probate Court judges who

sometimes hear Superior Court cases, and Superior Court Judges Robert J. Hallisey and John L. Murphy.

Garrity said the solution lies in abolishing the law that requires a teenager to get court permission to have an abortion.

"That law isn't there to help teenagers make up their minds. That law is there to make it tougher for a young woman to get an abortion," Garrity said. "I've got real problems with the law."

The only action pending in the Legislature on the subject would make the law tougher by allowing a judge to bring a teenager's parents to court for a consultation if the judge decides the teenager lacks the maturity to decide on an abortion on her own. The measure, sponsored by state Rep. Paul White, D-Boston, has received initial approval in the House.

An opponent of the bill to bring the parents into court is Rose Udics of Planned Parenthood, the non-profit service that counsels women on reproductive matters, including abortion and adoption. She said many teenagers keep their pregnancy from their parents for fear of emotional and possibly physical punishment.

The Patriot Ledger
Monday, July 27, 1987

Parental Consent for Abortion: Impact of the Massachusetts Law

Virginia G. Cartoof, PhD, and Lorraine V. Klerman, DrPH

Abstract. This study assessed the impact of Massachusetts' parental consent law, which requires unmarried women under age 18 to obtain parental or judicial consent before having an abortion. Data were analyzed on monthly totals of abortions and births to Massachusetts minors prior to and following the April 1981 implementation of the law. Findings indicate that half as many minors obtained abortions in the state during the 20 months after the law went into effect as had done so previously. More than 1,800 minors residing in Massachusetts traveled to five surrounding states during these 20 months to avoid the statute's mandates. This group accounts for the reduction in in-state abortions. A small number of minors (50 to 100) bore children rather than aborting during 1982, perhaps because of the law. Findings suggest that this state's parental consent law had little effect on adolescent's pregnancy-resolution behavior. (Am J Public Health 1986; 76:39-400.)

Introduction

During the decade following the legalization of abortion, large numbers of adolescents elected to terminate their pregnancies rather than to give birth. Between 1973 and 1980, adolescent abortions increased 86 per cent, from

201,327 to 375,213.[1] In 1977, 53 per cent of pregnant women under age 15 had abortions, as did 39 per cent of 15 to 17 year olds, and 35 per cent of 18 and 19 year olds.[2] In 1978, 24 out of every 1,000 White teenagers and 51 out of 1,000 teenagers of other races had abortions, up from 14 and 25 per 1,000, respectively, in 1973.[3] As the number of adolescent abortions rose over the decade, births to women under age 20 declined, and birth rates decreased substantially each year.

For most young adolescents, access to abortion without parental consent has been readily available. In a survey conducted in 1979-80, only 38 per cent of freestanding clinics and 48 per cent of hospitals required that parents consent to or be notified of a minor daughter's abortion. In the absence of policies regarding parental consent, about half the adolescent population choose to

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1/ Centers for Disease Control: Abortion Surveillance: Preliminary Analysis--United States, 1981. MMWR 1984; 33:373-375.

2/ Centers for Disease Control: Teenage Childbearing and Abortion Patterns--United States, 1977. MMWR 1980; 29:157-160.

3/ Ezzard N, Cates W, Dramer D, Tietze C: Race-specific patterns of abortion use by American teenagers. Am J Public Health 1982; 73:809-814.

involve their parents in a planned abortion.[4 5 6 7 8]

Despite the practices of abortion facilities and the observed behavior of pregnant teenagers, public opinion has not supported the notion that young adolescents should have access to an abortion without their parents' involvement. A 1983 Garth poll indicated that only 29 per cent of registered voters believed that minor women (generally those under age 18) should be allowed to have abortions without their parents being notified by the attending

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4/ Torres A, Forrest J, Eisman S: Telling parents: clinic policies and adolescents' use of family planning and abortion services. Fam Plann Perspect 1980; 12:284-292.

5/ Rosen RH: Adolescent pregnancy decision-making: are parents important? Adolescence 1980; 15:44-54.

6/ Clary F: Minor women obtaining abortions: a study of parental notification in a metropolitan area. Am J Public Health 1982; 72:283-285.

7/ Bracken M, Klerman L, Bracken M: Abortion, adoption or motherhood: an empirical study of decision making during pregnancy. Am J Obstet Gynecol 1978; 130:251-262.

8/ Furstenberg F Jr, Herag-Baron R, Shea J, Webb D: Family communication and teenagers' contraceptive use. Fam Plann Perspect 1984; 16:163-170.

physician.[9] Six years earlier (in 1977), a Gallup poll had found that even among Americans who had positive attitudes toward abortion, only 46 per cent supported the idea that abortions should be available to minors on their own consent.[10]

Paralleling these trends, anti-abortion legislators and lobbyists have pressured for the passage of state laws regulating and restricting young women's access to abortion. Their efforts have been most successful in the enactment of parental consent and/or notification statutes which require that the parents of a minor woman consent to or be notified of a planned abortion. In some instances the permission of a probate or Superior Court judge may be substituted for parental involvement, or physicians may be allowed to make individual exceptions. The age range of those who are subject to these laws varies as well, with some states targeting those under age 18 while others focus on those under age 16.

Eighteen states have enacted parental consent and/or notification laws since 1973, and, while some of these statutes

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9/ Public Support for Legal Abortions Continues, Although Poll Shows Conflicting Trends in 1983. Fam Plann Perspect 1983; 15:279-281.

10/ Public Support for Legal Abortions Continues, Although Poll Shows Conflicting Trends in 1983. Fam Plann Perspect 1983; 15:279-281.

have been struck down because of their failure to include constitutional safeguards to minors' rights to access to abortion, 12 laws were in effect in mid-1985.[11] Additional state legislatures across the United States are expected to consider and pass bills requiring parental or judicial involvement with young adolescents' decision-making around abortion.

This article summarizes the findings of a study of the effects of one such law, first passed by Massachusetts in 1974, and then again in 1980, after six years of legislative and judicial debate that reached all the way to the US Supreme Court (Bellotti v. Baird, 443 U.S. 62, 1979). Finally, implemented in April 1981, the law requires that unmarried women under age 18 obtain the notarized or in-person consent of both

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11/ National Abortion Rights Action League: Laws Affecting Minors' Access. Internal memo. Washington, DC, NALAL, October 1985. Parental consent statutes are in effect in Louisiana, Massachusetts, North Dakota, Rhode Island and Utah; and have been enjoined in Kentucky, Missouri, and Pennsylvania. Parental notification laws are in effect in Arizona, Idaho, Maryland, Minnesota, Montana, Utah and W. Virginia; and have been enjoined in Illinois, and Nevada. Alan Guttmacher Institute: Statutory Requirements for Parental Consent for Minors Seeking Abortion. Internal memo. New York: AGI, May 1982.

their parents, or of a Superior Court judge before having an abortion. If judicial consent is sought, the Court must find a minor to be mature enough to make her own decision to abort, or that an abortion would be in her best interest.[12]

Methods

Data were collected from the Massachusetts Department of Public Health on the number of abortions to minors and non-minors in the state each month during the period from August 1977 (the first month that Massachusetts' abortion data collection system was in place) through 1982. Additional monthly data on the number of Massachusetts minors who obtained abortions in five surrounding states (New Hampshire, Rhode Island, Connecticut, Maine, and New York) during 1980, 1981, and 1982 were collected. The number of births to minor women in Massachusetts each month during the years between 1970 and 1982 were also obtained. These data were examined for trend, and analyzed statistically using Box and Jenkins' univariate time series method.[13] [14]

12/ Donovan P: Judging teenagers: how minors fare when they seek court-authorized abortions. Fam Plann Perspect 1983; 15:259-267.

13/ Donovan P: Judging teenagers: how minors fare when they seek court-authorized abortions. Fam Plann Perspect 1983; 15:259-267.

14/ McCleary R, Hay R Jr: Applied Time
(Footnote 14 continued on next page)

In addition, interviews were held with abortion clinic counselors and administrators in order to approximate the proportion of minors choosing each consent option after the law went into effect.

(Footnote 14 continued from previous page)
Series Analysis. Beverly Hills: Sage Publications, 1980.

TABLE 1 - Number of Abortions to Women Ages 18 and Over, and 17 and Under in Massachusetts: 1978-1982

No. Abortions by Age (years)	
18 and over	17 and under
1978 total	
36,113	4,632
Monthly average	
3,009	386
1979 total	
38,845	5,221
Monthly average	
3,237	435
1980 total	
38,901	5,113
Monthly average	
3,242	426
1981 total	
37,672	3,370
January-April average	
3,385	380
May-December average	
3,017	231
1982 total	
37,573	2,802
Monthly average	
3,131	234

Results

Abortions among women ages 18 and over in the state of Massachusetts increased each year between 1978 and 1980. Yearly totals began declining during 1981 and continued to decline in 1982. The adult population's use of

abortion seems to have reached its "ceiling" in early 1981 and to have begun a gradual decline during the next 20 months.

Annual totals and monthly averages of women ages 17 and under who obtained abortions in Massachusetts increased between 1978 and 1979 then decreased in 1980. The monthly average continued declining during the first four months of 1981, just prior to the effective date of the parental consent law. The decline in the frequency of abortions to minors in the state that occurred in 1980 appears to have presaged a similar decline in abortions to women over age 18 that began in 1981 (see Table 1). During the 45 months prior to the law's implementation, an average of 412 minor women had abortions in the state.

On April 23, 1981, Massachusetts' parental consent law was implemented. Beginning in May of that year, and continuing through 1982, a monthly average of 233 women under age 18 had abortions in Massachusetts. The decline occurred abruptly and as soon as the law went into effect: 226 minor abortions were performed in May, the first full month that the law was in effect, the lowest number of these abortions performed in the state in any of the 45 months since data were first collected. This level was maintained, with little variation, for the next 20 months. As compared to the 45 months prior to the law's implementation, the monthly average for these 20 months represents a decline of 43 per cent, from 412 to 233 (See Figure 1). The possibility that these numbers may be deflated in part because

of underreporting by individual physicians must be acknowledged. Physicians' liability to suit by the non-consenting parents of a minor abortion patient, we suspect, keeps such underreporting to a minimum.

According to abortion clinic personnel, about 75 per cent of the minors who remain in-state to terminate their pregnancies have parental consent, and the rest (about 50 girls a month) obtain consent from a Superior Court judge.

Prior to implementation of the parental consent law, few Massachusetts women of any age went to out-of-state facilities for their abortions: in 1980, only about 1,398 women did so, 3 per cent of the state's abortion patients.[15] During the four months that preceded implementation of the parental consent law (January through April 1981), an average of only 29 Massachusetts women under age 18 obtained abortions each month in four neighboring states: New York, New Hampshire, Connecticut, and Rhode Island (no date are available for the state of Maine before April 1981). None of these states had passed or implemented a parental consent law prior to or during this period. More than half of these out-of-state abortions were performed in Rhode Island, but Connecticut, New Hampshire, and New York also served between one and seven

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15/ Centers for Disease Control: Abortion Surveillance: Annual Summary 1979-1980. Atlanta: CDC, 1982.

Massachusetts minors each of these months.

During May 1981, the first full month that the Massachusetts law was in effect, the number of minors who obtained out-of-state abortions jumped to 69, an increase of 130 per cent over the average of the first four months of 1981. From May through December 1981, a total of 731 Massachusetts women under age 18 had abortions in five surrounding states: Rhode Island (342, or 47 per cent of the total), New Hampshire (286, or 39 per cent), Connecticut (41, or 6 per cent), Maine and New York (31 apiece, or 4 per cent of the total each). During the last eight months of 1981, an average of 91 minors left Massachusetts for an abortion each month, or 300 per cent more than in the preceding four months. That figure increased to 95 a month during 1982, for a total number of out-of-state abortions of 1,141 in that year, bringing the 20-month (post-implementation) total to 1,872 and the monthly average to 94.

In addition to the monthly increase in 1982 over 1981, other new trends developed in that year in the distribution of Massachusetts minor abortion patients to other states: Connecticut and New Hampshire each captured an increased proportion of the total number (up 1.4 per cent and 6 per cent, respectively); and New York, Rhode Island, and Maine saw decreased proportions (down 1 per cent, 8 per cent, and 2 per cent, respectively). At least two identifiable factors seem to be responsible for these shifts between 1981 and 1982. The first is that Rhode Island began implementing its version of a

parental consent law (only one parent's consent is required) in September 1982. As soon as that state's law went into effect, the flow of Massachusetts minors to Rhode Island diminished from an average of 40 a month (January through August 1982) to an average of only 12 a month (September through December). At the same time, Connecticut's share of Massachusetts minor abortion patients increased from four to 14 a month, and New Hampshire's from 42 to 53 a month. It is clear that the distribution of minor women in states other than their home state is dramatically and immediately affected by the presence of a parental consent law.

Astute marketing on the part of one New Hampshire facility, owned by a single physician, may have had an additional effect on these trends. This doctor began advertising in the 1982 Yellow Pages of metropolitan areas along the northern Massachusetts border, stating "consent for minors not required." In 1982, this facility performed a monthly average of twice as many abortions on Massachusetts' minors (27) as in 1981 (14).

In order to determine the extent to which minor abortions in Massachusetts were affected by the parental consent law, 65 monthly observations of abortions to minors in Massachusetts (August 1977 through December 1982) were analyzed using time series analysis. This analysis indicated the presence of a statistically significant intervention at the 46th month of the series, May 1981, the first full month after the law's implementation.

A second analysis of the law's impact was conducted on minor abortions in Massachusetts and in the five neighboring states described above, to determine the extent to which minors who did not obtain abortions in Massachusetts were represented by the 1,872 minor abortions performed in these states during the 20 months following implementation. When monthly observations of out-of-state abortions to Massachusetts minors were added to monthly totals of in-state abortions for the period May 1981 through December 1982, the significant residual found earlier at the 46th observation no longer occurred.

The limitation of this analysis is that complete data on out-of-state abortions to Massachusetts minors is unavailable for the 45 months prior to the law's implementation. While anecdotal data from this study indicate that a small number of such abortions did occur, national data on out-of-state abortions suggest that twice as many out-of-state minors came to Massachusetts for that reason. Presumably, the flow of these minors into the state diminished appreciably when the law was implemented. We conclude that the effect of the omission of out-of-state abortions to Massachusetts minors in the preintervention period is compensated for by the inclusion of in-state abortions to non-Massachusetts minors during these 45 months.

A third analysis predicted the occurrence of Massachusetts abortions to minors in the absence of the parental consent law during the first 20 months the law was in effect. Table 2 presents

a comparison of actual (in-state and out-of-state) abortions obtained by Massachusetts minors and those predicted by the model for these 20 months. The predicted observations in Table 2 are not intended as precise forecasts, nor can they be compared month-for-month with actual observations, as both contain a margin of error. Foremost among sources of error is the fact that abortions are obtained in Massachusetts between the 8th and 24th weeks of pregnancy. Nevertheless, totals of the two columns are close enough to lead to the conclusion that the vast majority of minors who would have had abortions in Massachusetts were it not for the parental consent law are accounted for by the 1,872 minors who went out of state for their abortions.

Annual totals of births and birth rates of under 18 year-old women residing in Massachusetts increased slightly from 1970 to 1972, fluctuated somewhat from 1973 through 1975, and then began decreasing gradually through 1981. In 1982, there was a slight, but hardly important increase: 0.1 births per 1,000 women ages 12 through 17 years. Table 3 summarizes these data.

TABLE 2 - A Comparison of Actual and Predicted Observations of Abortions to Massachusetts Minors, May 1981-December 1982

Month/ Year	Actual In-State	Actual Out-of-State	Actual Totals	Predicted Totals
1981				
May	226	69	295	306
June	229	86	315	368
July	248	112	360	321
Aug.	253	120	373	385
Sept.	240	99	339	281
Oct.	247	108	355	314
Nov.	193	70	263	282
Dec.	215	67	282	277
1982				
Jan.	244	100	344	328
Feb.	238	93	331	320
March	263	107	370	341
April	226	86	312	315
May	212	91	303	291
June	217	112	329	315
July	246	108	354	327
Aug.	223	101	324	394
Sept.	210	94	304	300
Oct.	244	86	330	314
Nov.	223	75	298	283
Dec.	256	88	344	279
TOTALS	4,653	1,872	6,525	6,341

TABLE 3 - Massachusetts Resident Births and Birth Rates among Women Ages 12 through 17, 1970-82

Year	No.of Births	Rate per 1000 Women Ages 12 through 17
1970	2,929	9.4
1971	3,036	9.8

1972	3,268	10.6
1973	3,216	10.5
1974	3,087	10.1
1975	3,022	10.3
1976	2,736	9.3
1977	2,626	8.9
1978	2,570	8.8
1979	2,550	8.9
1980	2,471	8.4
1981	2,449	8.3
1982	2,478	8.4

SOURCES: Massachusetts Department of Public Health, Health Statistics: 1970 and 1980 Census of the Population, General Population Characteristics--Massachusetts.

Time series analysis of births to minor women in Massachusetts indicate that the parental consent law may have had a very slight impact on the number of babies born to this population in 1982. Had the rate of decline continued in 1982 at the same pace as it had in the previous 10 years, the total for 1982 would have been reduced by between 50 and 100 births. Other demographic shifts may be responsible for the rise, however, including increased numbers of Latino adolescents in the Massachusetts population, a group that experiences high rates of childbearing.

Discussion

These analyses indicate that the major impact of the Massachusetts parental consent law has been to send a monthly average of between 90 and 95 of the state's pregnant minors across state lines in search of an abortion. This number represents about one in every

three minor abortion patients living in Massachusetts. More minors went out of state in 1982 than in 1981, suggesting wider knowledge and acceptance of out-of-state abortions by this population. If this trend continues, an ever-increasing proportion of young women will be influenced by expanding numbers of their peers to leave Massachusetts in search of an abortion, largely because of the parental consent law.

The evidence regarding births to minors since the law's implementation is not quite as definitive. Both the annual total and the annual rate of these births indicate a small increase in 1982, the equivalent of about 50 to 100 births, over the previous year. While additional analysis would be required to determine definitively the cause of this increase, the possibility that the parental consent law was a contributing factor cannot be ruled out.

While advocates of parental consent laws support the concept in the name of family unity, enhanced communication between parents and their children, protection of young adolescents who are unable to make mature decisions, and a reduction in the rate of abortion among them, there is little evidence that this law is having those effects. Massachusetts minors continue to conceive, abort, and give birth in the same proportions as before the law was implemented.

ACKNOWLEDGMENTS

This paper was prepared for presentation at the 113th Annual Meeting of the American Public Health

Association, Washington, DC, November 17-21, 1985.

MASS. GEN. LAWS. C.112

§12S. Consent to abortion; form; persons less than eighteen years of age

No physician may perform an abortion upon a pregnant woman without first obtaining her written informed consent. The commissioner of public health shall prescribe a form for physicians to use in obtaining such consent. This form shall be written in a manner designed to permit a person unfamiliar with medical terminology to understand its purpose and content, and shall include the following information: a description of the stage of development of the unborn child; the type of procedure which the physician intends to use to perform the abortion; and the possible complications associated with the use of the procedure and with the performance of the abortion itself; the availability of alternatives to abortion; and a statement that, under the law of the commonwealth, a person's refusal to undergo an abortion does not constitute grounds for the denial of public assistance. A pregnant woman seeking an abortion shall sign the consent form described above at least twenty-four hours in advance of the time for which the abortion is scheduled, except in an emergency requiring immediate action. She shall then return it to the physician performing the abortion who shall maintain it in his files and destroy it seven years after the date upon which the abortion is performed.

The said consent form and any other forms, transcript of evidence, or written findings and conclusions of a court, shall be confidential and may not be released to any person except by the pregnant woman's written informed consent or by a proper judicial order, other than to the pregnant woman herself, to whom such documents relate, the operating physician, or any person whose consent is required pursuant to this section, or under the law. If a pregnant woman is less than eighteen years of age and has not married, a physician shall not perform an abortion upon her unless he first obtains both the consent of the pregnant woman and that of her parents, except as hereinafter provided. In deciding whether to grant such consent, a pregnant woman's parents shall consider only their child's best interests. If one of the pregnant woman's parents has died or is unavailable to the physician within a reasonable time and in a reasonable manner, consent of the remaining parent shall be sufficient. If both parents have died or are otherwise unavailable to the physician within a reasonable time and in a reasonable manner, consent of the pregnant woman's guardian or guardians shall be sufficient. If the pregnant woman's parents are divorced, consent of the parent having custody shall be sufficient. If a pregnant woman less than eighteen years of age has not married and if one or both of her parents or guardians refuse to consent to the performance of an abortion, or if she elects not to seek the consent of one or

both of her parents or guardians, a judge of the superior court department of the trial court shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion or, if said judge determines that she is not mature, that the performance of an abortion upon her would be in her best interests. A pregnant woman less than eighteen years of age may participate in proceedings in the superior court department of the trial court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court appointed counsel, and shall, upon her request, provide her with such counsel. Proceedings in the superior court department of the trial court under this section shall be confidential and shall be given such precedence over other pending matters that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman. A judge of the superior court department of the trial court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting his decision and shall order a record of the evidence to be maintained including his own findings and conclusions.

Nothing in this section is intended to abolish or limit any common law rights of persons other than those whose rights

it governs for the purpose of any civil action or any action for injunctive relief under section twelve U.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 81-124 CIVIL

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS & OTHERS

vs.

FRANCIS X. BELLOTTI, & OTHERS

MEMORANDUM UNDER THE GENERAL SUPERINTENDENCY POWER CONCERNING THE IMPLEMENTATION OF ST. 1980, c. 240, INSERTING G.L. c. 112, § 12S

On May 13, 1981, the Planned Parenthood League of Massachusetts, Crittenton Hastings House & Clinic, Phillip G. Stubblefield, M.D., and a Mary Moe filed an amended complaint seeking, in addition to class action certification, injunctive and declaratory relief regarding the implementation of G.L. c. 112, § 12S, inserted by St. 1980, c. 240. This court, acting on the plaintiffs' motion to consolidate, transferred the case to the Superior Court, where the case of Baird v. District Attorney of Suffolk County, is pending. This memorandum issues in response to the plaintiffs' further motion filed on May 19, 1981, for Suggested Guidelines under our general superintendence powers. G.L. c. 211, § 3. Because the question of the underlying merits is now before the Superior Court, I proceed under the caveat that this memorandum in no way

addresses the merits. I make no definitive rulings of law but simply offer suggestions to alleviate confusion and expedite the present administration of the consent procedures mandated by G.L. c. 112, § 12S. Nor does this memorandum foreclose action by the Rules Committee of the Superior Court to promulgate uniform procedural rules. Alternatively, the Chief Justice of the Superior Court may wish to adopt my suggested guidelines in conjunction with his Standing Order No. 12-80. (I have been informed by Mr. Ostrach, assistant attorney general representing Chief Justice Lynch, that while the Chief Justice neither recommends nor approves of these or any guidelines, he does not object to their promulgation by this court.)

Background observations. On April 22, 1981, the full bench of the Supreme Judicial Court heard the plaintiffs' complaint for a preliminary injunction to stay the implementation of St. 1980, c. 240. The plaintiffs' request for preliminary injunctive relief was denied on April 23, 1981; and implementation of the abortion consent procedures commenced throughout the Superior Court. On May 13, 1981, the plaintiffs filed this amended complaint, seeking injunctive and declarative relief against the statute as applied. This action we have transferred to the Superior Court, along with an order dismissing three of the defendants named on the complaint (including the Chief Justice of the Superior Court).

The plaintiffs buttress the instant motion for guidelines with affidavits from six attorneys who have served

clients seeking judicial authorization for abortion over the first seven weeks of the statute's implementation. These affidavits depict inconsistencies in the actual application of § 12S, both in the courts and in the servicing health care agencies.

We note that promptness of administration is a preeminent consideration of St. 1980, C. 240. The trial court is mandated to give § 12S proceedings "precedence over other pending matters" and to "reach a decision promptly and without delay" as a matter of the best interests of the pregnant woman. The Chief Justice of the Superior Court sought to effectuate this mandate through his Standing Order No. 12-80. That order requires a Clerk Magistrate to bring the matter immediately to the attention of the sitting Justice or to any Justice who is available to take prompt action. Technical defects in the pleadings are to be overlooked in the interest of speedy disposition. The order mandates that the clerks of court treat petitioners in a manner that is "confidential and expeditious to the fullest extent practicable."

I am convinced from my reading of the submitted affidavits that the specific directives of the statute and of the Chief Justice's standing order require fleshing out and clarification. My overriding concern in taking this action is that no minor be injured or deprived of her rightful recourse to the courts. This Commonwealth bears a long tradition of deference to and solicitous consideration of the best interests of minors and of persons otherwise

incompetent to assert their legal rights. See generally Custody of a Minor, 375 Mass. 733, 752-755 (1978); G.L. c. 119. Time is always of the essence in an abortion decision. Where the peculiar sensitivities of a minor complicate that choice, all responsible adults must marshall their energies to facilitate the minor's decision-making process. It is in the spirit of parens patriae and as a reflection of this court's interest in the expeditious administration of justice that I suggest the guidelines which follow.

SUGGESTED GUIDELINES

I preface my enumeration of guidelines with a word of thanks to all counsel and to the parties themselves for the helpfulness and constructive interaction which they consistently demonstrated among themselves and with the court. The suggested guidelines reflect in essence proposals submitted to me by both parties jointly after considerable out-of-court negotiation, drafting and redrafting. I have accepted their joint proposal, with some slight modification (including the deletion of proposed par. 15).

S U G G E S T E D G U I D E L I N E S

The following guidelines for handling § 12S petitions ("petitions") are suggested to the Superior Court. These guidelines are intended to supplement Superior Court Standing Order No. 12-80 and not to replace it.

1. Petitions should ordinarily be heard on any day the court is in session.

2. Petitions should be heard as expeditiously as possible upon filing with the Clerk/Magistrate's office, and

on the same day if practical.

3. All technical defects in the proceedings and in the pleadings and papers should ordinarily be disregarded by the Court and by the Clerk/Magistrate.

4. Hearings must be confidential and should be held in the judge's lobby except where physically impossible. The petition ("minor") should be permitted to have present any person she desires (social worker, counselor, parent, friend), but he judge should exclude all unnecessary court personnel or others. The minor should be free to choose whether to go forward without counsel.

5. The minor should not be required to state her true name. After explaining the impoundment procedures used to ensure confidentiality, the judge may wish to ask the minor her true first name in order to address her by it during the hearing. The transcript should not contain the minor's full true name since she will have previously stated her identity on a sealed affidavit held by the Clerk/Magistrate pursuant to Superior Court Standing Order No. 12-80.

6. It is contemplated that the judge will conduct the hearing on a "two-tier" basis with "maturity" determined first, and "best interest" addressed only if maturity is not found.

7. As to the "maturity" finding, inquiry may be appropriate in such areas as the minor's age and school and work experience, any history of mental illness or other treatment relating to mental competence, and whether the abortion decision is a personal decision and not one forced upon the minor by another and whether the minor has discussed her

decision with other persons. In any inquiry as to the minor's maturity and her understanding of the nature, consequences and significance of her abortion choice, or in any inquiry as to her best interest, it is suggested that the judge should avoid the creation of the appearance of seeking to promote a particular set of moral values by inquiring into the minor's or her parents' views as to the morality of abortion; or into whether the minor considers a fetus to be an "unborn child," as to whether the minor believes she is in some way taking or destroying life.

8. Where the court finds a minor is not mature, it must make a determination of whether the abortion or childbirth alternative is in her "best interest". The court may be guided in making such a determination by the substantially coextensive doctrine of substituted judgment. That doctrine essentially requires a court to determine what an incompetent person would choose were she fully competent, while bearing in mind her expressed choice and partial competency. Various considerations may be relevant to a "best interest" determination. As to this finding, the court may inquire into the minor's reasons for not seeking her parents' consent. Where the minor is accompanied by one parent who supports her petition, that support should be given great if not dispositive weight.

9. Where the court preliminarily concludes that the minor is mature, appointment of a guardian ad litem should ordinarily be unnecessary. Where the

court preliminarily concludes that the minor is not fully mature, it should consider whether such an appointment is necessary to assure protection of the minor's best interest or whether it would lead to unnecessary delay, particularly if the minor is represented by counsel, or has been counseled by competent professionals, or is accompanied by a parent or other adult.

10. In view of the statutory mandate for expeditious decisions, petitions may be decided in chambers and should, in any event, be decided as promptly as possible, and ordinarily within twenty-four hours or less. The Clerk/Magistrate should inform the minor of the decision as soon as possible and in the manner which the minor requests.

11. The Judge or Clerk/Magistrate should give the minor a copy of an order under § 12S bearing the court's docket number, and a copy of her sealed affidavit bearing the same docket number. Where the decision can be made immediately, the Judge may choose to have the minor wait, deliver the order and a copy of the affidavit to her, and seal the original affidavit in her presence.

12. A petition should not be denied or a hearing delayed solely because the minor has not selected a particular clinic, hospital or doctor for performance of the abortion. If the judge authorizes an abortion for an immature minor on the "best interest" basis, he may inquire into her contemplated plans in order to assure himself that the particular course of medical treatment she intends to follow will be in her best interests.

13. Appointed counsel in § 12S proceedings should be paid for in the same fashion as in criminal cases or in such other fashion as the Chief Administrative Justice of the Trial Court finds is best suited for such proceedings.

14. The Chief Justice of the Superior Court Department should consider issuance of standard forms for findings and orders under § 12S for utilization by the court where possible, in order to expedite proceedings.

CONCLUSION

My hope is that this memorandum will prove useful to all interested parties and to the trial court personnel directly charged with its implementation. I repeat my earlier observation that this memorandum reflects this court's interest, under its superintendency power, in the efficient administration of justice. A copy of this memorandum, and the suggested guidelines, is to be sent to Chief Justice James P. Lynch of the Superior Court.

/s/ Paul J. Liacos
Paul J. Liacos
Associate Justice

June 16, 1981
A TRUE COPY

Attest: /s/ John E. Powers, Clerk
June 16, 1981

AMENDED STANDING ORDER NO. 12-80

[Applicable to all Counties]

Effective August 1, 1981

Subject: Amending No. 12-80 (Uniform Procedures Re: Petitions for Abortion Authorization Under G.L. c. 112, §12S) to change the manner in which petitions in Suffolk County shall be assigned and to include as an attachment suggested guidelines, originally set forth in Planned Parenthood League of Massachusetts v. Bellotti, No. 81-124 Civil (Supreme Judicial Court for Suffolk County; Liacos, J. Single Justice)(June 16, 1981)

(1) Except in the County of Suffolk, upon the filing of a petition or motion (petition) under G.L. c. 112 §12S, inserted by St. 1980, ch. 240 (a copy of which is attached), the Clerk-Magistrate (clerk) shall immediately bring the matter to the attention of the justice sitting in the civil motion session or if no such session is being held, to a jury-waived session. If no jury-waived session is being held at that time, the petition shall be brought to the judge sitting in a civil jury session. If there are neither civil motion, jury-waived nor civil jury session, the matter shall be brought before any justice sitting in any other session.

In the County of Suffolk, upon the filing of a petition, the Clerk-Magistrate for Civil Business for Suffolk County shall immediately bring the matter to the attention of the justice sitting in the civil assignment session, who will either hear the petition in that session or, through the clerk, assign it for a hearing in another civil session.

In any event, the matter shall be given priority over all other cases then pending "so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman." G.L. c. 112 §12S, inserted by St. 1980, ch. 240. In this regard, the court should not decline to decide a case brought under §12S because of any pleading omissions or other technical defects and shall assist the minor, particularly if unrepresented by counsel, in presenting relevant facts and by liberally construing the pleadings. (A copy of a form petition, which is to be made easily available to petitioners, is attached.)

If the petition is filed in a county in which no session is being held, the clerk of court who received the petition shall immediately notify the Chief Justice of the Superior Court by telephone of the pending petition. The Chief Justice shall then take such action as is necessary to reach a decision promptly and without delay so as to serve the best interests of the pregnant woman.

(2) Although §12S permits a pregnant woman less than eighteen years of age to participate in proceedings in the Superior Court Department in her own behalf, it is preferable that the minor be represented by counsel. The statute requires that the court advise her that she has a right to court-appointed counsel and that the court shall, upon her request, provide her with such counsel.

Also, the court may appoint a guardian ad litem to represent the minor or may make such other orders as necessary pursuant to Mass. R. Civ. P. 17(b). The compensation for counsel and/or for the guardian ad litem shall be certified by the justice as an expense incident to the operation of the court. If the minor requests waiver of costs and fees, as provided by St. 1980, c. 539, such costs and fees are to be waived.

(3) As provided by §12S, all proceedings shall be confidential and all pleadings and other papers filed shall be designated anonymously. For example, the proceedings shall be titled Mary Moe, Mary Doe, etc. If the minor files papers which do not insure her anonymity, the court shall have the papers processed in a manner which will insure anonymity and shall return the defective papers to the minor or her counsel. An affidavit shall accompany the papers in the case. Such affidavit shall reveal the minors true identity. The affidavit shall be sealed in an envelop [sic] which will be identifiable by having the docket number of the case inscribed upon it. All such

envelopes shall be kept in a separate file by the clerks of the various courts. All papers in the proceeding shall be impounded.

The clerks of the various courts shall undertake to insure that the minor's contract with the clerk's office is confidential and expeditious to the fullest extent practicable. For example, assistance in filing a petition should be provided in a confidential setting, such as a private office. Similarly, one or more persons in the clerk's office should be at all times available to answer questions asked by a minor, either in person or by phone, and to assist the minor in expeditiously presenting her petition to the court. Each clerk shall designate one or more persons to receive and process §12S petitions and shall insure that one such person is available to insure prompt treatment.

(5) All proceedings under c. 112, §12S, shall be conducted jury-waived with a court reporter present. The statute requires the court to make in writing specific factual findings and legal conclusions supporting his or her decision and to order that a record of evidence be maintained which includes his or her own findings and conclusions.

(6) Suggested guidelines, originally emanating from a memorandum of the Single Justice for Suffolk County in Planned Parenthood League of Massachusetts v. Bellotti, No. 81-124 Civil (Supreme Judicial Court for Suffolk County; Liacos, J. Single Justice) (June 16, 1981), are attached hereto.

James Lynch
Assistant Justice of the
Superior Court Department

APPEALS COURT

NO. 81-1038
IN THE MATTER OF MARY MOE.
ORDER

This matter has been considered upon the Superior Court judge's memorandum of decision on a petition under G.L. c. 112, § 12S, as appearing in St. 1980, c. 240, and upon a transcript of the hearing on the petition. See Rule 1:28 of the Appeals Court, as amended ____ Mass. ____ (1980).

1. The record discloses a significant inconsistency between (a) the judge's acceptance of a written waiver of the right of counsel and (b) his finding that the petitioner is not mature. Section 12S specifically affords the petitioner the right to counsel. Waiver of the right to counsel must be intelligent, competent and understanding. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Faretta v. California, 422 U.S. 806, 835 (1974). Commonwealth v. Cavanaugh, 371 Mass. 46, 53 (1976).

2. The grounds stated by the [Superior Court] judge for refusing to appoint counsel whom the petitioner had requested, disclose and misunderstanding of In the Matter of McKenney, Mass. Adv. Sh. (1981) 1621, 1644.

3. The questions put to the petitioner about her knowledge of electricity and her responses, were largely irrelevant to a determination of

her maturity and her best interests with regard to the question whether she might have an abortion.

The petitioner, not [fully] represented by duly appointed counsel (although her attorney was permitted to be present and to participate), was not afforded an adequate hearing and was denied the representation contemplated by § 12S. Therefore, the order for the entry of judgment is vacated and because the case must be dealt with expeditiously, the matter is remanded to the Superior Court to be heard by the judge currently assigned to sit in Barnstable County, as soon as may be as a matter of emergency. The judge shall reconsider the question of appointing competent counsel. By way of suggestion, we note that testimony of the foster mother (with whom the petitioner claims to have discussed this matter) and the petitioner's evaluation upon her placement in a foster home by the Department of Public Welfare (if that can be made available without delay) may be of assistance to the Superior Court judge, and to this court if further review is sought.

By the Court (Hale, C.J., Cutter, and Kass, JJ.),

/s/ Susan Mellen

Assistant Clerk

Entered: October 13, 1981

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

A.C.-82-425

IN THE MATTER OF MISS M.M.

O R D E R

We affirm the decision not to authorize an abortion at this time without prejudice to a renewal of the petition if accompanied by the results of an ultrasonic examination and accompanied by evidence of the reliability of such examination. Evidence of reliability may be in the form of a sworn statement contained in a letter of a qualified physician or other expert.

By the Court (Dreben, Rose, & Kass, JJ.).

Assistant Clerk

Entered: April 16, 1982

APPEALS COURT

Date: April 16, 1982

A TRUE COPY

ATTEST: /s/ Warren L. Shields

Assistant Clerk

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NO. 82-1058

IN THE MATTER OF MARY MOE.

MEMORANDUM AND SUMMARY ORDER

A probate judge sitting in the Superior Court under statutory authority has checked off a boilerplate finding on a printed form which recites that the petitioner, an unmarried sixteen-year-old who is approximately eight weeks pregnant, "is not sufficiently mature to give informed consent" to an abortion which she desires to have without the knowledge or consent of either of her parents. See G.L. c. 112, § 12S, as appearing in St. 1980, c. 240. The judge refused to authorize an abortion under the second paragraph of § 12S, and the petitioner appealed.

Substantial portions of the judge's other findings are devoted to the proposition that the medical advice which the petitioner has received thus far (most of it from laymen) is insufficient to permit her to understand the medical procedures and risks involved in or attendant upon an abortion, or to permit an informed consent to an abortion. Such findings were and are beside the point. The only question with any medical implication which was before the judge was, and the only such question which is before this court is, whether the petitioner is "mature and capable of giving informed consent to the proposed

abortion" after she has received from a physician the detailed medical advice which must be given her in the manner prescribed by the first paragraph of § 12S. Nowhere does the judge address those questions; nowhere does he give any indication of actual disbelief of the testimony of the petitioner or of the representations of her able and experienced appointed counsel which are material to the questions of the petitioner's maturity and her ability to give an informed consent. To the contrary, it is clear from a reading of the transcript of the proceedings that the quoted boilerplate finding is tainted by the judge's personal views on the morality of sexual promiscuity between unmarried teenagers and on abortion in general, and by his antagonism toward counsel who lend assistance to persons such as the petitioner. In all the circumstances, the quoted finding must be branded clearly erroneous. Contrast In The Matter of Moe, Mass. App. Ct. Adv. Sh. (1981) 1439, 1439-1440.

After careful consideration of all the evidence and all the aforementioned representations of counsel, the panel find as matters of fact that the petitioner is mature enough to be, and that she is, capable of giving informed consent to the abortion desired by her. Accordingly, acting under the provisions of Rule 1:28 of the Appeals Court, as most recently amended, it is ordered:

1. that the order entered in the Superior Court on September 20, 1982, in the matter numbered 82A-

117 on the civil docket of said court in Middlesex county be, and the same hereby is, reversed;

2. that a new order is to issue from that court forthwith which authorizes an abortion for the purpose and within the limitation of the second paragraph cf G.L. c. 112, § 12S, without notice to or the consent of either of the petitioner's parents;

3. that appointed counsel for the petitioner be, and she hereby is, awarded $250 for her fees and expenses in connection with this appeal; and

4. that the rescript of this court is to issue forthwith.

By the Court (Hale, C.J., Grant & Brown, JJ.),

/s/ Susan Mellen

Assistant Clerk

Entered: September 27, 1982.

April 11, 1983

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NO. 83-392

IN THE MATTER OF MARY MOE.

MEMORANDUM AND ORDER

The petitioner has appealed from a refusal by a judge of the Superior Court to order authorization for an abortion in accordance with G.L. c. 112, § 12S. We have findings of fact made by the Superior Court judge in which he concludes that the petitioner is insufficiently mature and, therefore, concludes that an abortion would not be in her best interests.

The petitioner appeared before a panel of this court accompanied by counsel. At the appeal we were informed of events which occurred subsequent to the date on which the judge entered his findings, notably that she had received counselling from professional social service personnel and that she had undergone an ultrasonic examination which disclosed her to be twenty weeks pregnant on April 7, 1983.

We said in In the Matter of Moe, Mass. App. Ct. Adv. Sh. (1981) 1439, 1439-1440, that the finding of the Superior Court judge was entitled to deference and would not be set aside unless clearly erroneous. Upon review of the record, we conclude that finding a immaturity by the judge is clearly

erroneous. The judge equated maturity with the possession of general information and vocabulary skills. That is not the test for these purposes. See In the Matter of Moe, supra at 1440 n.1. The record here discloses that the petitioner did possess information relevant to her decision, had evaluated it, and made decisions based on those evaluations. She displayed adequate knowledge of the medical procedure she would be required to undergo.

Having concluded on the record, under Rule 1:28 of this court, that the minor has the requisite maturity and is capable of giving informed consent in accordance with G.L. c. 112, § 12S, an order is to issue forthwith from the Superior Court authorizing a physical to perform an abortion in accordance with sound medical practice and subject to his determination that the petitioner is in her second trimester of pregnancy. The rescript is to issue forthwith.

So ordered.

By the Court (Kass, Cutter & Warner, JJ.),

/s/ Susan Mellen

Assistant Clerk

APPEALS COURT
Date: April 11, 1983
A TRUE COPY.
ATTEST: /s/ Susan Mellen
Assistant Clerk

Entered: April 11, 1983.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NO. 85-15

IN THE MATTER OF MARY MOE

ORDER

After hearing and consideration pursuant to Rule 1:28 of this court, we find the evidence presented at the hearing insufficient to make the findings required by G.L. c. 112, § 12S, both with respect to the questions of maturity or the best interests of the child, should the judge need to reach the latter.

Accordingly, the "Determination and Order" of the Superior Court entered on January 9, 1985, is vacated. The petition is to be heard anew. There is no basis for the finding that the agency which referred the petitioner to counsel has a "financial interest in the matter." The judge hearing the petition anew may approve reasonable compensation for the petitioner's prior counsel as well as for her counsel at the new hearing. In view of the urgency of the matter, the petition is to be referred to the Chief Justice of the Superior Court for assignment of a hearing time.

By the Court (Greaney, C.J., Dreben & Kass, JJ.),

/s/ Andrew P. Quigley

Assistant Clerk

Entered: January 10, 1985.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NO. 85-501

IN THE MATTER OF MARY MOE.

MEMORANDUM AND ORDER

An examination of the record reveals the petitioner to be seventeen years old and a senior in high school with high grades, who intends to further her education at college in the fall. She also works part time as a cashier at a local department store. For the reasons articulated in the Superior Court by petitioner's counsel, the petitioner could not feasibly consult with her parents because, in the case of her mother, consultation is impractical and in the case of her father, consultation would likely lead to an estrangement in their relationship based on his reaction to the pregnancy of the petitioner's older sister. In denying the petitioner's request for an abortion, the judge appears to have placed great weight on his finding that the petitioner "has been subject to coercive counseling by those with financial and personal biases, and is thus incapable of mature and rational decision making regarding this issue." There is no basis in the evidence, however, to support a finding that the agency which counseled the petitioner had any financial interest or any bias or that anyone else who discussed the matter with the petitioner subjected her to coercion. From all that appears, the petitioner was mature in making her decision after she had been

counseled. In the circumstances, we conclude that the judge erred in finding the petitioner immature.

Accordingly, after examination of the original papers and oral argument, it is ordered pursuant to Rule 1:28 of this court that the order of the Superior Court entered on May 10, 1985 is reversed. A new order is to enter which finds that the petitioner is mature and capable of giving informed consent, and that she therefore may give informed consent to undergoing an abortion pursuant to a decision reached in

consultation with her physician without the consent of either of her parents.

By the Court (Greaney, C.J., Dreben & Fine, JJ.).

/s/ Warren L. Shields

Assistant Clerk

Entered: May 14, 1985.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 86-1143

IN THE MATTER OF MARY MOE

MEMORANDUM AND ORDER

The panel have examined all the original papers transmitted from the Superior Court in this matter (Suffolk Superior No. 86421), have listened to the tape of the proceedings today conducted by a judge of that court, and have entertained and considered oral argument by counsel for the petitioner on the appeal to this court.

The panel find nothing in the evidence which would compel different conclusions from those reached by the judge on (1) the question of the petitioner's immaturity and (2) the question whether the performance of an abortion would be in her best interests.[1] It does not appear that either the petitioner or her counsel was deprived of the opportunity to present evidence on either of those questions.

1/ See the second clause of the seventh sentence of the second paragraph of G. L. c. 112, § 12S, as appearing in St. 1980, c. 240.

Accordingly, it is ordered, under the provisions of Rule 1:28 of this court, that the judgment of the Superior Court be, and the same hereby is, affirmed.

By the Court (Grant, Kass & Warner, JJ.),

/S/ Andrew P.Quigley

Assistant Clerk

Entered: October 22, 1986